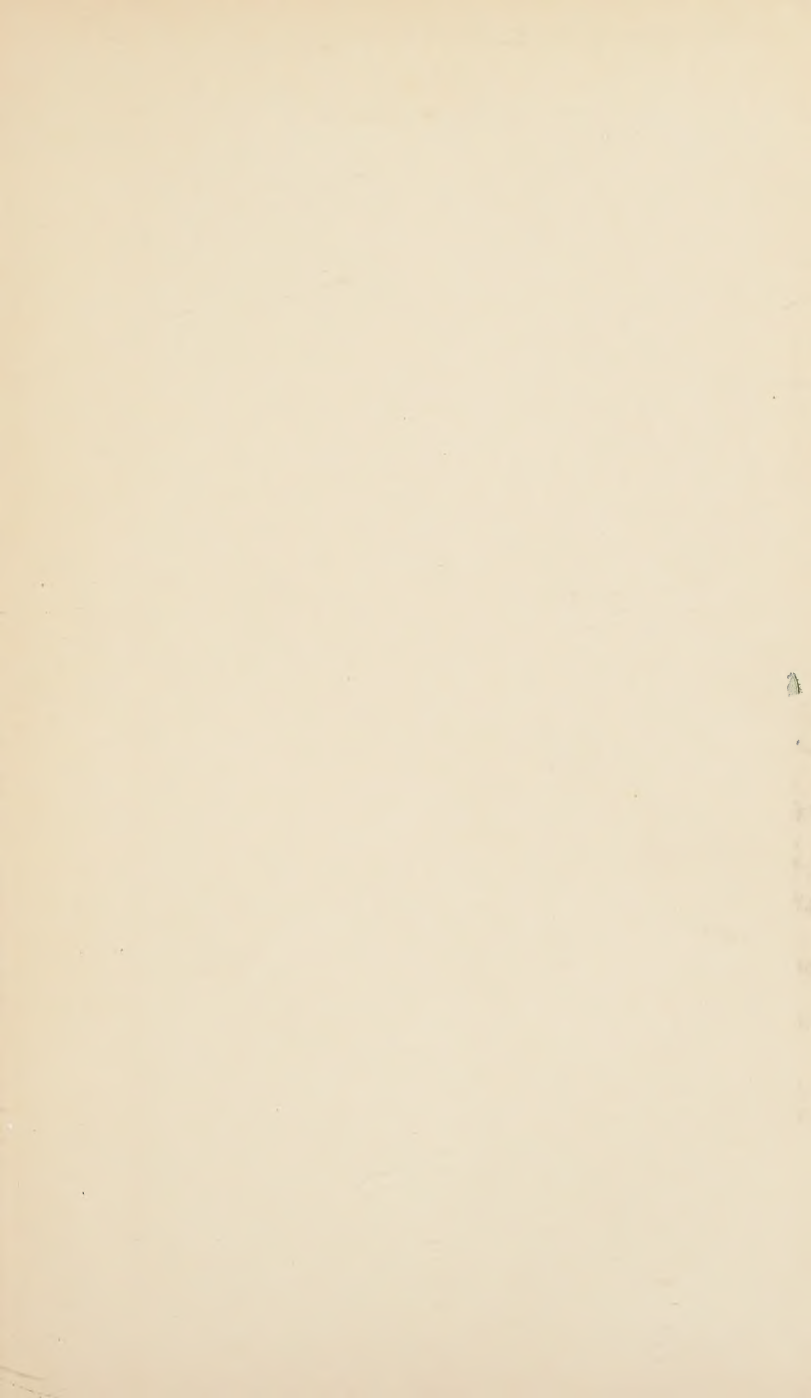


LAWSON ON CONTRACTS

Missouri Institute of Accountancy and Law

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2249a Missouri Avenue

1/11/2004
Read about infants
(contents refer to infants perinatal etc)



de Valley and Besenbale
Liquidated Damages & Penalties
Rules of the court to interpret an ambiguous
Contract

THE PRINCIPLES

OF THE

AMERICAN

LAW OF CONTRACTS

AT LAW AND IN EQUITY

THIRD EDITION

BY

JOHN D. LAWSON, LL. D.

AUTHOR OF A COMPANION WORK ON THE PRINCIPLES
OF THE LAW OF BAILMENTS, AND EDITOR
OF AMERICAN STATE TRIALS.


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THE PRINCIPLES OF THE AMERICAN LAW OF CONTRACTS.

PREFACE TO THIRD EDITION.

This work I presented to the profession in 1893. It was an attempt to give in a clear, accurate and brief way the principles of the Law of Contracts, as interpreted and applied in the courts of this country, and was the result of my experience as a Law School teacher of that subject. It soon became popular not only in Law Schools, but likewise with the practicing attorney who wished to find, without an elaborate search, the law of the case before him. During the years that elapsed before a second edition was published in 1905, I continued to teach the Law of Contracts and that edition was much improved through an experience of twelve years as a teacher and investigator. Sixteen years more have rolled by, during which time I have continued the study of my subject, and I today present to the bench, the bar and the student, the result of over thirty years of teaching and original research.

Although I have added many new and interesting applications of principles and discussions of controverted questions, I have been able, by condensation and the cutting out of cumulative citations on well settled rules, to keep the book within the size of the previous edition. Thirty years ago, it was the custom of writers of text books to cite all the decided cases on their topic. But with the legions of reported decisions that the Courts are and have for more than a decade been giving to the world, this is no longer possible. The field is today occupied by a new and distinct class of publications in which the *Cyclopedia of Law and Procedure* and the *Corpus Juris*, take first place, and where one can

find arranged by States all the reported adjudications of all the courts. I have therefore, declined in this edition, to append to the statement of well settled rules, a mass of authorities, and on points not general or well known have been content to cite only a few of the leading cases. For others the inquirer is referred to Cyc. and C. J.

Why should a writer follow a statement of a legal principle that is familiar to every law student and denied by nobody, with a reference to a multitude of judicial opinions in which the judges have repeated it? Is it not as absurd to cite adjudged cases to support the rules that a simple contract requires a consideration, that the contract of an infant is voidable and that an illegal agreement is void, as it would be for a writer on some non-legal subject, who should state that a gentleman will not lie, that honesty is the best policy and that two and two make four, to follow these maxims with a long reference to book after book where others have said the same thing?

The favor with which this work has been received by the Bench is shown in the large number of opinions by the judges of courts of last resort, in which the principles of the Law of Contracts, as stated by me in these pages and repeated by me elsewhere¹, have been cited, approved and relied on. A table of these cases will be found on page xxix.

J. D. L.

¹ My article on Contracts in 9 Cyc. 213-786.

TABLE OF CASES WHERE THE PRINCIPLES AND
RULES AS STATED BY THE AUTHOR HAVE
BEEN CITED AND APPROVED BY
COURTS OF LAST RESORT.

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 Section 147. Shipley v. Bunn, 125 Mo. 445. (Criticized.)
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 Section 284. Union Nat. Bank v. R. Co., 145 Ill. 208; 34 N. E. 139.
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 Section 306. Basket v. Moss, 20 S. E. 734 (N. C.).
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 Section 308. Basket v. Moss, 20 S. E. 734 (N. C.).
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 Section 355. Streichen v. Fehleisen, 84 N. W. 715 (Ia.).
 Section 360. Holt v. Thurman, 63 S. W. 281 (Ky.).
 Section 390. Brenneman v. Brush, 30 S. W. 699 (Tex.).
 Section 396. Jones v. Williams, 139 Mo. 6.
 Section 396. Reilton v. Taylor, 38 Atl. 382 (R. I.).
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 Section 462. Trammell v. Vaughan, 158 Mo. 226; 59 S. W. 83.
 Section 464. Driver v. Salt Lake Co., 22 Utah, 143; 61 Pac. 734
 Section 468. Wilson v. Owens, 1 Ind. Terr. 163; 38 S. W. 978.
 Section 469. Oriental Hotel Co. v. Griffiths, 88 Tex. 574; 33 S. W. 658.
 Section 478. Hassard v. Hardison, 114 N. C. 482; 19 S. E. 729.
 Section 484. Hassard v. Hardison, 114 N. C. 482; 19 S. E. 729.

PRELIMINARY.

Plan and Arrangement of the Work.

The work is divided into five main parts and twenty chapters, viz.:

Part I. THE FORMATION OF THE CONTRACT, *i. e.*: What are the elements necessary to a valid contract?

Here we find that there must be an *Agreement* (Cap. I) which is either *Express* or *Implied* (Cap. II); that it must be expressed in a certain *Form* (Cap. III); that it must be founded upon a *Consideration* (Cap. IV); that it must be made by *Parties* capable of contracting (Cap. V); with their real *Consent* (Cap. VI), and that it must be for a *Legal Object* (Cap. VII).

Part II. THE OPERATION OF THE CONTRACT, *i. e.*: Whom does it affect, and who are the persons who may obtain rights or may be held liable under it?

Here we find that not only does it affect the original *parties to the agreement* (Cap. VIII), but likewise those persons who may take the place of either of the original parties by *Assignment* (Cap. IX).

Part III. THE INTERPRETATION OF THE CONTRACT, *i. e.*: In what modes and by what rules is the meaning of the contract to be arrived at?

Here we find certain legal rules by which we can ascertain what the terms of the agreement were, which we call *Proof of the Contract* (Cap. X), and certain other legal rules by which we can ascertain what those terms mean—which we call *Construction of the Contract* (Cap. XI).

Part IV. THE DISCHARGE OF THE CONTRACT, *i. e.*: In

what modes does the obligation come to an end and the parties become freed from its rights and liabilities?

Here we find that the contractual tie may be loosened and the parties freed from its rights and liabilities either by *Agreement* (Cap. XII); by *Performance* (Cap. XIII); by *Impossibility of Performance* (Cap. XIV); by *Operation of Law* (Cap. XV); or by *Breach* (Caps. XVI-XVII).

Part V. THE REMEDIES UPON THE CONTRACT, *i. e.*: In what modes and to what extent may either party obtain satisfaction when the other fails to perform what he has promised?

Here we find that he may recover compensation for the loss a breach has caused him, which compensation is called *Damages* (Cap. XVIII), or the court may in certain cases compel the party in default to actually perform what he promised, which is called *Specific Performance* (Cap. XIX); and lastly that this right of action may be *Discharged* in various ways (Cap. XX).

PART I.

THE FORMATION OF THE CONTRACT.

§ 1. INTRODUCTORY.—CONTRACT DEFINED.—OTHER DEFINITIONS.

§ 1. *Introductory—Contract Defined—Other Definitions.*

A *contract* is defined by the most distinguished chief justice of the highest court in the land and the most august judicial tribunal in the world, as an agreement in which a party undertakes to do or not to do a particular thing.¹ This, however, falls very far from describing the kind of agreement which is essential to a contract binding and enforceable by law. An agreement may exist and yet not make a valid contract; or it may be valid as an agreement, and yet not be so expressed in its form as to be enforceable; or it may possess these two elements and yet not contain the consideration which the law requires; or it may possess these three elements and yet not be entered into by parties legally capable of contracting; or it may possess these four elements and yet not have the necessary legal consent of the parties; or it may possess these five elements and yet be for an object which in the eye of the law is not a legal object.

Therefore, in treating of the formation of the contract, *i. e.*, the elements necessary to a valid contract, we shall consider, first, the agreement, either express or implied; second, the form required; third, the consideration required; fourth, the capacity of the parties; fifth, the consent of the parties; sixth, the legality of the object of the agreement. These six requisites are essential to a valid contract, for where any one of them is absent, the agreement is in some cases merely unenforceable, in some voidable at the option of one of the parties, in some absolutely void.

A *contract* then is the result of agreement and obligation; by agreement being meant the expression by two or more

¹ Marshall, C. J., in *Sturgis v. Crowninshield*, 4 Wheat. 197. This definition of "Contract" has been repeated in a number of subsequent cases. For these cases and a collection of other definitions of courts and text-writers, see 9 Cyc., 241, note 13 C. J. 237. Am. Dig. (2nd Dec.) p. 1309.

persons of a common intention; by obligation being meant the duty which the law imposes upon the parties to act as they have agreed to act.² And this obligation is not present unless the agreement contains the requisites just mentioned. A contract may therefore be defined as *the agreement of two or more competent persons, in proper form, on a legal consideration and with their free consent upon a legal subject-matter.*³

The offer by one to do or not to do something becomes a *promise* when it is accepted by the party to whom it is made. Promise implies futurity; something to be done or left undone hereafter. Something carried out at its inception—like the sale of goods for cash over the counter, is a mere exchange, no promise, no obligation and hence no contract. The parties to a promise are called *promisor* and *promisee* and the result of the mutual promises is agreement.⁴

An *executed* contract is a contract which has been fully performed since it was made, or which was performed at the time it was made, so that nothing remains to be done on either side.⁵ An *executory* contract is one which is either

² "Contract results from a combination of the two ideas of agreement and obligation." Anson, *Contr.* 1.

³ As an agreement to constitute a contract must create a legal obligation, it is not correct to speak of a "void" contract—for it is the agreement which is void, i. e., destitute of legal effect and there is no contract at all. But the words contract and agreement have been so long used by writers and judges as meaning the same thing that it is too late to try to change legal terminology so far as this subject is concerned.

⁴ *McKinley v. Watkins*, 13 Ill. 140; *Brown v. Rice*, 29 Mo. 322; *Eliason v. Henshaw*, 4 Wheat. 225; *Tucker v. Woods*, 12 Johns. 190, 7 Am. Dec. 305; *King v. Warfield*, 67 Md. 246; 1 Am. St. Rep. 384; *Demoss v. Noble*, 6 Iowa 530.

⁵ *McCutcheon v. Cleas*, 26 Colo. app. 374; 143 p. 143. *Leadbetter v. Hanley*, 59 Or. 427, 117 Pac. 289. This word as meaning a contract that has been fully performed by both parties has received much criticism. Anson calls it a slippery word (*Contr.* § 25), and Ashley (*Contr.* § 6), says that there is no such thing as an executed contract; that one might as well speak of a dead live man. In the subject matter of the contract has been performed that extinguishes it. It either exists or is terminated, is alive or dead. A layman usually speaks of a writing being "executed" when it is signed, or in the case of a deed, signed, sealed and delivered.

wholly unperformed, or in which there remains something to be done on both sides—as in the case of mutual promises to marry, where the promise of each party is the consideration for the promise of the other, or a promise on one side to furnish goods or perform services, and a promise on the other side to accept and pay for the same. A contract may be executed on one side as executory on the other,⁶ as where one has paid for goods which another has agreed to deliver, or where one has delivered goods which another has promised to pay for.⁷

When the consideration on both sides of an executory contract is a promise the contract is *bilateral*. Where the promise is on one side only it is *unilateral*, and the offeree is not bound to perform at all nor until performance by him is the offerer bound; but on performance by the offeree the proposal of the offerer is turned into a binding contract.⁸ An offer of a reward is a good example of this.

⁶ *McNett v. Cooper*, 13 Fed. Rep. 586; *Justice v. Lang*, 42 N. Y. 493, 496, 1 Am. Rep. 576.

⁷ *Winders v. Keenan*, 161 N. C. 628; 77 S. E. 687.

⁸ *Cyc.* 244, 13 C. J. 245.

CHAPTER I.

THE AGREEMENT.

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§ 2. *What Is Agreement.*

Agreement consists in two or more persons being of the same mind and intention concerning the subject matter.¹ As it is frequently put by the courts the minds of the parties must meet.²

§ 3. *Common Intention Essential.*

This common intention can not be present where there is doubt or difference on either side. Thus if A offers B to sell him his horse and B replies, "I might purchase it at the price you asked," there is no agreement.¹ Neither is there where A says, "I will sell you my horse for one hundred dollars," and B replies, "I will give you seventy-five for it."²

§ 4. *Intention—How Ascertained.*

A person's state of mind or intention can be ascertained only by outward expressions, such as words or acts. Therefore the law excludes all questions of intention unexpressed,

¹ *Bruce v. Pierson*, 3 Johns. 534; *Scoggins v. U. S.* 255, Fed. Rep. 825; *Davis v. Wells*, 85 Fed. 896.

² *Harper v. Goldschmidt*, 156 Cal. 245, 104 Pac. 451; *Ross v. Savage*, 66 Fla. 106, 63 South 148; *Ward v. Erie Co.*, 149 N. Y. S. 717, 215 N. Y. 629; *Creedy v. Grief*, 108 Va. 320, 61 S. E. 769; *Kelly Asphalt Co. v. Barber Co.*, 211 N. Y. 68; *Rodgers Co. v. Bell*, 156 N. C. 378, 72 N. E. 817; *Smith v. Faulkner*, 12 Gray 251 (Mass.).

¹ *Stagg v. Compton*, 81 Ind. 171. "I guess I can ship it to you" is not an offer to ship. *Topliff v. McKendree*, 80 Mich. 148, 55 N. W. Rep. 109. Where, in answer to an order to a wholesale merchant of eight hundred pairs of shoes, the latter acknowledged by postal card the receipt of the order and said, "The same shall have prompt attention," the court said that this was not an absolute acceptance, but merely a courteous promise to give it consideration. *Mannier v. Appling*, 112 Ala. 663, 20 South. Rep. 978. And the same view was taken of a letter reading, "I am prepared to make the arrangements with you on the terms you name." *Havens v. Ins. Co.*, 11 Ind. App. 315, 39 N. E. 40; *Thurber v. Smith*, 54 Atl. Rep. (R. I.).

² See post, § 25.

and imputes to a person a state of mind or intention corresponding to the rational and honest meaning of his words and acts. Whatever a man's real intention may be, if he so conducts himself that a reasonable man would believe that he was assenting to what he proposed, and the latter on the faith of this contracts with him, the man so conducting himself is as much bound as if he had actually intended to agree to the other party's terms.¹

"If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention."²

If a man writes a letter to another and its language shows an offer to contract, he will not be allowed to say, "I did not intend to make an offer in writing that letter."³ A person can not set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.⁴

And it does not matter how formal or informal the words used may be. A says to B, "I want you to send your wagon for my goods tomorrow to take them to the station." B replies, "All right." This is an agreement.⁵

§ 5. *Intention to Bind Essential—Promissory Expressions.*

The intention to bind oneself must appear, for all promissory expressions do not by acceptance constitute an agree-

¹ *Hudson v. Columbian Co.*, 100 N. W. Rep. 402 (Mich.) 9 Cyc. 246, 278; *Smith v. Hughes*, L. R. 6, Q. B. 607; *Freeman v. Cooke*, 2 Ex. 654; *Hand v. Gas Engine, etc., Co.*, 167 N. Y. 142, 60 N. E. 425; *Esterly Harvesting Mach. Co. v. Criswell*, 58 Mo. App. 471; *Mansfield v. Hodgdon*, 147 Mass. 304.

² *Brown v. Hare*, 3 H. & N. 484; *U. S. v. Richards*, 149 Fed. 443.

³ *Harris v. Amoskeag Lumber Co.*, 97 Ga. 465, 25 S. E. 519; *Dillon v. Anderson*, 43 N. Y. 231.

⁴ *McKenzie v. Stretch*, 53 Ill. App. 184, post, § 9.

⁵ *Pitts., etc., R. Co. v. Racer*, 10 Ind. (App.) 503, 38 N. E. Rep. 186.

ment.¹ They may have the form of an offer and yet not be such as the law will enforce. The case of a mere jest is clear.² If A, for example, is riding a broken down horse and B in a spirit of badinage calls out, "I say, will you take \$1,000 for your horse?" B's reply, "I will," could by no possibility be considered as the conclusion of a contract to sell the horse for \$1,000. But suppose a man, who believes his life in danger from a disease or an injury, says to his physician, "O doctor, I will give all I have if you will save my life," and the physician says, "I'll try," and does, by his surgical skill, save his patient's life. Is this a contract?

The reports do not give much light; the few adjudicated cases are hard to reconcile. In a Tennessee case,³ where defendant and his family were in deep affliction over the murder of his son; he himself was laboring under the effect of severe wounds received from the person who had killed the son and when his arrest was spoken of, he said he would give two hundred dollars to have him arrested. Plaintiff, who was present, made the arrest and claimed the reward. But the Court held that there was no offer.

"What is called an offered reward was nothing but a strong expression of his feelings of anxiety for the arrest of those who had so severely injured him, and this greatly increased by the distracted state of his own mind, and that of his family; as we frequently hear persons exclaim, 'Oh! I would give a thousand dollars if such an event were to happen,' or vice versa. No contract can be made out of such expressions; they are evidence of strong excitement, but not of a contracting intention."

¹ Carson v. Lucas, 13 B. Mon. 213; Stagg v. Compton, 81 In. 171; Westervelt v. Demarest, 46 N. J. (L.), 37, 50 Am. Rep. 409, 9 Cyc. 276; 13 C. J. 287.

² Post, § 9.

³ Stamper v. Temple, 6 Humph. 296, and see Higgins v. Lessig, 49 Ill. (App.) 461, where as to similar language as to one whom he suspected of having stolen an old harness from him, the court said: "It was indicative of a state of excitement so out of proportion to the supposed cause of it that it should be regarded rather as the extravagant exclamation of an excited man than as manifesting an intention to contract."

So in an old case where A told B that he would give \$100 to anyone who married his daughter with his consent and B did so and sued for the \$100, it was ruled not to be reasonable that a man should be bound by general words spoken to excite suitors⁴. On the other hand, in a Wisconsin case, where a man standing in front of a burning building shouted to the crowd, "I will give \$5,000 to any person who will bring the body of my wife out of that building dead or alive," this was held to be a binding agreement with one of the firemen who entered the house and brought out the woman;⁵ and in Illinois, where at a public meeting, during the war, a man declared that he would give \$400 to get his sons relieved from the draft, this was held a binding promise to pay that amount to anyone who should accomplish that object.⁶

"If I have valuable property in imminent danger and I make proclamation that I will give \$50 to save it and a stranger undertakes the labor and does save it, on what principle of law or justice is it that I should not pay. So here the defendant declared he would give \$400 to save his sons from the draft and put the declaration in writing. The plaintiff incurred the expense and trouble necessary to save his sons and did save them, why then should he not be paid the amount promised."

In a recent English case the defendants, the proprietors of a medical preparation called The Carbolic Smoke Ball, issued an advertisement in which they promised to pay £100 to any person who contracted influenza after having used one of their smoke balls in a certain specified manner and for a certain specified period. The plaintiff sued for £100 alleging that on the faith of the advertisement she purchased one of the smoke balls, used it in the manner and

⁴ *Weeks v. Tybald*, Noy 11; *Rolle Abr.* 6.

⁵ *Reif v. Page*, 55 Wis. 731.

⁶ *McClure v. Wilson*, 43 Ill. 356, 50 Ill. 366; *Patton v. Hassinger*, 69 Pa. St. 311.

for the time specified, but nevertheless contracted the influenza. It was contended by the defendants that this was not an offer at all or at least not one that any sensible person would take to be a bona fide offer. But all the judges of the Court of Appeals pointed out that the advertisement contained this clause: "£1,000 is deposited in the Alliance Bank, Regent street, showing our sincerity in the matter," and that this must have been for the very purpose of leading those who read the advertisement to believe that the defendants were serious in their proposal and intended to fulfill their promise.

"It may be, that of the many readers of the advertisement very few sensible ones would have entertained expectations that in the event of the smoke balls failing to act as a preventive against the disease the defendants had any intention to fulfill their attractive and alluring promise; but it must be remembered that such advertisements do not appeal so much to the wise and thoughtful as to the credulous and weak portions of the community; and if the vendor of an article, whether it be medicine smoke or anything else, with a view to increase its sale or use, thinks fit publicly to promise to all who buy or use it, that to those who shall not find it as efficacious as it is represented by him to be, he will pay a substantial sum of money, he must not be surprised if occasionally he is held to his promise."⁷

It is not easy to state any definite rule by which such cases should be governed, but it may be said broadly that the question is whether the terms of the offer and the circumstances under which it is made are such as to give a person a right to act upon it as a real and intentional offer.

§ 6. *Same—Statements of Intention.*

Of a similar character are mere statements of intention, though they be accepted or acted upon by the party to

⁷ *Carlill v. Carbolic Smoke Ball Co.*, L. R. Q. B. D. (1892-1893), 484, 260.

whom they are made.¹ Where a father writing to a man who was going to marry his daughter said, "She will have a share of what I leave after the death of her mother," this was held not a promise.² So where another parent, in answer to a suitor for his daughter, wrote, "I shall allow her the interest on £2,000, whether she remains single or marries. If the latter, I may bind myself to do it, and pay the principal at my death to her and her heirs," this was held not to create a contract, because it did not import an intention to make a binding promise.³ So there was no contract where a person to whom a proposal was made replied, "I am prepared to make the arrangements with you on the terms you name."⁴

Here, as before, it is a question of fact whether what was said was a mere statement of intention or was intended as a definite offer or acceptance.⁵ Where A, on opening a number of bids, said to B, one of the bidders, "I guess it is up to you, yours is the lowest bid," it was held that this was acceptance of B's bid.⁶

An advertisement of a sale by auction is not an offer, so as to bind the advertiser, to persons attending the sale, to sell the property or to sell it on the terms advertised.⁷ An announcement that an examination for a scholarship will be held does not imply a condition that the scholarship

¹ 9 Cyc. 277; 13 C. J. 287; *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505, 7 So. 444; *Erwin v. Erwin*, 25 Ala. 236; *Miller v. Mackay*, 204 Ga. St. 315, 54 Atl. 171. Statements of intention made to third persons cannot be considered as offers. *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Dunning v. Thomas*, 10 Colo. 84, 14 Pac. 49; *Crane v. Critton*, 54 Iowa 738, 6 N. W. 79, 7 N. W. Rep. 138; *Morris v. Brightman*, 143 Mass. 119, 9 N. E. 512; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260.

² *Farina v. Ficus*, 1 Ch. 331 (1900).

³ *Randall v. Morgan*, 12 Vesey, Jr. 67.

⁴ *Hayens v. Ins. Co.*, 11 Ind. App. 315, 39 N. E. 40.

⁵ *Thurston v. Thornton*, 1 Cush. 79; *Henderson Bridge Co. v. McGrath*, 134 U. S. 260.

⁶ *Lane v. Warren*, 53 Tex. Civ. App. 122, 115 S. W. 903.

⁷ *Hanes v. Nickerson*, L. R. 8, Q. B. 280, 9 Cyc. 280.

will be given to the competitor obtaining most marks; and consequently there is no contract.⁸

§ 7. *Same—Invitations to Deal.*

A mere invitation to deal is not such an offer as may be turned into an agreement by acceptance. Thus in *Moulton v. Kershaw*,¹ A wrote to B: "We are authorized to offer Michigan fine salt in full carload lots of 80 to 95 barrels delivered in your city at 85 cents per barrel." B telegraphed: "Your letter of yesterday received and noted. You may ship me 2,000 barrels of Michigan fine salt as offered in your letter." This was held not a binding contract, A's letter was only a notice to those dealing in salt that he was in a position to supply that article for the prices named, and requesting offers from the person or persons addressed.²

Where defendants sent out a circular: "We are instructed to offer to the wholesale trade for sale by tender the stock in trade of A", amounting to so-and-so, "and which will be sold at a discount in one lot. Payment to be made in cash," it was held that this did not amount to a contract or promise to sell to the person who made the highest tender, but was, "a mere proclamation that the defendants are ready to chaffer for the sale of the goods and to receive offers for the purchase of them."³

Business circulars sent by mail or distributed by hand and advertisements in newspapers of goods for sale, fall under this head. They are merely invitations to trade; they go no further than what occurs when anyone asks another what he will give or take for certain goods. Such inquiries may lead to agreements, but do not make them.⁴

⁸ *Rooke v. Dawson*, 1 Ch. 489.

¹ Wis. 316; 48 Am. Rep. 516; 18 N. W. Rep. 172; *Clark v. Atlantic S. Co.*, 163 Fed. 423.

² 1 Cyc. 278; 13 C. J. 288.

³ *Spencer v. Harding*, L. R. 5 C. P. 561.

⁴ *Zeltner v. Irwin*, 25 N. Y. App. Div. 228, 49 N. Y. Suppl. 337; *Spencer v. Harding*, L. R. 5 C. P. 561; *Walsh v. St. Louis Ex. Co.*, 90 Mo. 457, 16 Mo. (App.) 502; *Anson, Contr.* 10; *Ward v. Johnson*, 209 Mass. 89, 95 N. E. 290.

"A bookseller's catalogue, with prices stated against the names of the books, would seem to contain a number of offers. But if the bookseller receives by the same post five or six letters asking for a particular book at the price named, to whom is he bound? To the man who first posted his letter of acceptance? How is this to be ascertained? The catalogue is clearly an invitation to do business, and not an offer."⁵

So where a person or a corporation advertises for bidders for property to be sold or for work to be done, the advertisement is simply an invitation to make offers and the advertiser is not bound to accept the highest, the lowest or any of the bids.⁶

The mere statement of the lowest price at which a vendor will sell is not an offer to sell at that price to the person making the inquiry. A telegraphed, "Will you sell us B. H. P.? Telegraph lowest cash price." B telegraphed in reply, "Lowest price for B. H. P. 900*l*." and then A telegraphed, "We agree to buy B. H. P. for 900*l*. asked by you. Please send us your title-deed in order that we may get early possession," but received no reply. Here there was no contract, as the final telegram was not the acceptance of an offer to sell, for none had been made, but was itself an offer to buy, the acceptance of which must be expressed.⁷

Exposing goods in the window of a store, with a price attached is generally merely an invitation to trade, while the displaying them on a stand in the street where the passerby

⁵ *Anson, Contr.* 40. A circular sent out by a manufacturer of arms setting forth the terms and conditions on which orders will be filled is not an offer; *Montgomery Ward Co. v. Johnson*, 209 Mass. 89.

⁶ *Spencer v. Harding*, L. R. 5 C. P. 561; *Leskie v. Hazeltine*, 155 Pa. St. 98, 25 Atl. Rep. 866; *Anderson v. Public Schools*, 122 Mo. 65, 27 S. W. 610. But where an Exposition Company asked certain architects to submit plans for a building, each architect except the successful one to receive \$500, but the latter to be employed as architect and superintendent, the one having been declared the most meritorious, was held entitled to recover on a contract to make him architect and superintendent; *Walsh v. St. Louis Ex. Co.*, 90 Mo. 459.

⁷ *Harvey v. Facey*, A. C. 552 (1893), 211 Mass. 398, 97 N. E. 780.

may pick one up—as for example a fruit stand—would seem to be an offer.⁸

If the proposal can be construed as a definite offer, then a communicated acceptance makes the contract. If A had written, “We will sell you all the Michigan salt you may order at the price named,” the contract would have been complete upon B notifying him of the quantity he desired, as in a California case,⁹ where defendant had a crop of growing grapes and he offered to pick from the vines and deliver to plaintiff, at his vineyard, so many grapes then growing in said vineyard, as plaintiff should wish to take during the present year at ten cents per pound. When plaintiff, while the offer was in force, named the quantity, the contract was held to be complete and both parties bound as to the quantity named.

§ 8. *Intention Must Refer to Legal Relations.*

The intention of the parties must refer to legal relations; it must have reference to the assumption of legal rights and duties. One may accept a proposal to dine with another or to take a walk or go to a baseball match with him, and may even incur trouble and expense in keeping the engagement, yet no action will lie for the breach of the mere social engagement.¹ The reason in all these cases is that the promise was neither intended nor understood to create between the parties rights and duties enforceable by law.

“If, at a ball a young lady promises a gentleman to dance with him, say the sixth dance on the program, and afterwards dances it with someone else, no one would suppose that he could sue her for breach of contract. So if A agrees to join

⁸ See Post, § 14.

⁹ Kellar v. Ybarru, 3 Cal. 147; U. S. v. P. J. Carlin Cons. Co., 224 Fed. 859, 138 C. C. A. 449.

¹ Pollock, Contr. 2; Anson, Contr. 19; Erwin v. Erwin, 25 Ala. 236; Topping v. Swords, 1 E. D. Smith 609; Tucker v. Sheeran, 155 Ky. 670, 160 S. W. 176.

B tomorrow at a certain hour to take a bicycle ride together, this is not a promise creating a contract. So if in the playing of a charade a man and a woman go through the form of a betrothal there is no promise creating a contract so as to furnish the foundation for an action of breach of promise of marriage. * * * It is only those promises which as between the parties to them create or alter rights and duties, which the law treats as of binding obligation, that constitute contracts."²

§ 9. *Intention Must Be Serious.*

An offer cannot be the foundation of an agreement where it is made or accepted, not with the intention to contract, but as a mere jest or joke.¹ Where one gave a three-hundred-dollar check for a fifteen-dollar watch by way of mere frolic and banter, not expecting to buy the watch and the other not expecting to sell it, it was held that there was no contract;² and where two young people went through the marriage ceremony before a person authorized to celebrate marriages without really intending to marry, it was held that there was no marriage.³ But one is not permitted to say that he was jesting if his conduct and words would warrant a reasonable person in believing that he was serious.⁴ Thus in an Australian case:

"The question is raised whether there was any evidence upon which the judge might reasonably act that the defendant did at that time really, and not by way of banter only, request the plaintiff not to sell his shares or place them on the market. We are of opinion that there was such evidence. The defendant's answer to the plaintiff's claim was that

² Wald (G. H.) Lecture Introductory to the Study of the Law of Contract, Cincinnati, 1896.

¹ Theiss v. Weiss, 166 Pa. St. 9, 31 Atl. 63; Armstrong v. McGhee, Add. (Pa.) 261; Bruce v. Bishop, 43 Vt. 161.

² Keller v. Holderman, 11 Mich. 248, 83 Am. Dec. 737.

³ McClung v. Terry, 21 N. J. (Eq.) 225.

⁴ McKenzie v. Stretch, 53 Ill. (App.) 184; Plate v. Durst, 42 W. Va. 63, 24 S. E. 580.

having been asked by a friend of the plaintiff who was anxious and distressed by the falling state of the market to comfort him, he gave him an unreal and false promise without intending to perform it. The defendant admits that the plaintiff did not seem to take his words of comfort as a joke. Now the judge has found upon evidence amply sufficient that this defense is untrue.”⁵

§ 10. *Preliminary Negotiations.*

Where parties are negotiating as to the terms of an agreement to be entered into between them, there is no meeting of minds while such agreement is incomplete. Where they intend that their verbal negotiations shall be reduced to writing and signed by them as the evidence of the terms of their agreement, there is nothing binding on them until the writing is executed.¹ On the other hand if the parties intend that their oral agreement shall be put in writing simply as a memorial of it, the contract is binding, although it is never written out.² An agreement is very often made by correspondence, but care must be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. The question in such cases always is, did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up and by which alone they designed to be bound.³

⁵ *Nyulasy v. Brown*, 7 Vict. L. R. 663, 1 Willst. Cas. 57.

¹ 9 Cyc. 280; 13 C. J. 289; *Hammon v. Winchester*, 82 Ala. 470, 2 South. Rep. 892; *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 528, 49 N. E. Rep. 918; *Sanders v. Pottlizer Bros. Fruit Co.*, 144 N. Y. 209, 39 N. E. Rep. 75, 43 Am. St. Rep. 757; *Nolan v. O'Sullivan*, 148 Ill. App. 316; *N. E. Lumber Co. v. Gray's Harbor & Ry. Co.*, 221 Fed. 807, 137 C. C. A. 365.

² *Jenkins Co. v. Alpena Co.* 147 Fed. 641, 77 C. C. A. 625; *Conner v. Plank*, 25 Cal. App. 516, 144 Pac. 295; *U. S. v. Carlin Con. Co.*, 224 Fed. 859; *Green v. Cole*, 127 Mo. 587, 30 S. W. 135.

³ *Lyman v. Robinson*, 14 Allen 242; *Strobridge Lithographing Co. v. Randall*, 73 Fed. Rep. 619, 622; *Lynn v. Richardson*, 151 Ia. 284; 130 N. W. 1097.

The principle is well expressed in a Maine case.⁴

“From these expressions of courts and jurists it is quite clear that after all the question is one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft or if he signifies such an intention to the other party he will be bound by the contract actually made though the signing of the written draft be omitted. If on the other hand such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract its absence does not affect the binding force of the contract; if however it is viewed as the consummation of the negotiation there is no contract until the written draft is finally signed.”

§ 11. *Certainty Required.*

The promise must be certain in its terms, and not so indefinite and illusory as to make it impossible to say just what was promised.¹ Therefore, where A bought a horse from B, promising that “if the horse was lucky to him, he would give \$25 more or the buying of another horse,” it was held that this was too loose and vague to be considered in a court of law.²

“In another case A promised B to give up his business ‘so far as the law allows’; it was held that parties must fix the limits of their agreement and not leave it to be fixed by the

⁴ *Miss. etc. Steam Co. v. Swift*, 86 Me. 248.

¹ 9 Cyc. 248, 249; 13 C. J. 266; *Bauman v. Binzen*, 16 N. Y. S. 342; *Woods v. Evans*, 113 Ill. 186, 55 Am. Rep. 419; *Erwin v. Erwin*, 25 Ala. 236; *Wall's App.*, 111 Pa. St. 460, 56 Am. Rep. 258; *U. S. v. McMullen*, 222 U. S. 460; *Wineburgh v. Gay*, 27 Cal. App. 603; 105 Pac. 1003; *De Bearn v. De Bearn*, 126 Md. 629; 95 A. 476; *Rhyne v. Rhyne*, 151 N. C. 400; 66 S. E. 348; *Natl. E. Signaling Co. v. Fes-sender*, 207 Fed. 915, 125 C. C. A. 363.

² *Guthing v. Linn*, 2 B. & Ad. 232; *Burks v. Stam*, 65 Mo. (App.) 455.

courts;³ in another B promised C that if satisfied with him as a customer, he 'would favorably consider' an application to renew the contract; this was ruled to create no legal obligation;⁴ in another where the parties attempting to make an agreement by a telegraphic code had, by using too few words, made it so ambiguous as to be unintelligible even to them,⁵ the Court said that it was for the plaintiff, in an action for breach of contract, to show that his construction was the true one, and to prove that his proposal was so clear and unambiguous that the defendant could not be heard to say that he misunderstood it."

So where A promised B that if she, a single woman, would live with him until her marriage, he would give her one hundred acres of land, without any reference to locality or value, it was held void for uncertainty.⁶ Where an employer engages a servant, promising to give him such remuneration as he, the employer, shall think right, there is no legal liability to pay anything.⁷ A promise by a school trustee to a teacher to pay "good wages" was held too indefinite to found an action upon,⁸ as was one to give a child a "good share" of property⁹ and a stipulation in a contract that it might be canceled by either party for "good cause"¹⁰ and one giving the "use" of land for a certain purpose.¹¹

³ *Davies v. Davies*, 36 Ch. Dic. 359.

⁴ *Montreal Gas Co. v. Vasey*, A. C. 595 (1900).

⁵ *Falck v. Williams*, A. C. 176 (1900); *Gale v. Kennard*, 182 Mo. App. 498, 165 S. W. 842.

⁶ *Sherman v. Kitsmiller*, 17 Serg. & R. 45; *Cheney, etc. Wks. v. Sorrell*, 142 Mass. 442, 8 N. E. 332.

⁷ *Taylor v. Brewer*, 1 Maule & S. 290; *Roberts v. Smith*, 4 Hurl. & N. 315, 28 L. J.; Ex. 164; *Parker v. Ibbetson*, 4 Com. B. (N. S.) 346, 27 L. J. Com. P. 236.

⁸ *Fairplay School Tp. v. O'Neil*, 127 Ind. 95, 26 N. E. Rep. 686; *Smith v. Crum & Co.*, 208 Pa. 462, 57 A. 953.

⁹ *Adams v. Adams*, 26 Ala. 272.

¹⁰ *Cummer v. Butts*, 40 Mich. 322, 29 Am. Rep. 530. A written agreement may be void for uncertainty because of blanks left therein, or failure to name the parties, or because it is so misspelled or ungrammatical, etc., that it has no meaning at all. *Chumasero v. Gilbert*, 24 Ill. 293; *Atkins v. Van Buren School Tp.*, 77 Ind. 447; *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906.

¹¹ *Carr v. Aco*, 141 Ga. 219, 80 S. E. 716.

Persons must make their own agreements and not leave it to the courts to make them for them from the language they have used.

If an agreement is uncertain, it is because the offer was so, because the acceptance must be identical with the offer or there is no meeting of minds. If the offeree sees the uncertainty and proposes a change that will make the agreement certain, this is a new offer which puts an end to the other.¹²

An agreement, however, will not be considered uncertain if the court can see what the parties intended. Absolute certainty is not required, for that is certain which may be rendered certain, according to the maxim *id certum est quod certum reddi potest*.¹³ Thus a contract is not uncertain because it is silent as to the damages for its breach.¹⁴ An ambiguous contract is not necessarily uncertain.¹⁵

§ 12. *Intention Must Be Communicated.*

The intention of the parties must be communicated, for one's intention can be ascertained by another only by means of outward expressions, as words and acts.¹ "It is a trite law," said an old judge, "that the thought of man is not triable, for even the devil does not know what the thought of man is."²

Telling an intention to a third person is of no more effect than noting it in one's memorandum book, which is no more

¹² 9 Cyc. 248; Meixel v. Meixel, 161 App. Div. 518, 146 N. Y. S. 587.

¹³ Enshwiller v. Tyner, 54 Ohio St. 214, 44 N. E. 84; Caldwell v. School Dist., 55 Fed. Rep. 372; Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911; Lewis v. Creech, 162 Ky. 763; 173 S. N. 133; Voorhees v. Louisiana Purchase Co., 243 Mo. 418, 149 S. W. 783; Ramey Lbr. Co. v. Schrader Lbr. Co., 237 Fed. 39, 150 C. C. A. 241.

¹⁴ Dugger v. Kelly, 168 Ia. 129; 150 N. W. 127.

¹⁵ Wisconsin Farm Co. v. Watson, 160 Wis. 638, 152 N. W. 449; Ramey Lbr. Co. v. Schroeder Lbr. Co., 237 Fed. 39, 150 C. C. A. 241.

¹ 9 Cyc. 246; 13 C. J. 265; Troustine v. Sellers, 35 Kan. 447, 11 Pac. Rep. 441; Prescott v. Jones, 69 N. H. 305, 41 Atl. Rep. 352; James v. Marion Fruit Jar Co., 69 Mo. (App.), 207.

² Brian, C. J., quoted in Brogden v. R. Co., 2 App. Cas. 692; Farnum v. Whitman, 187 Mass. 381, 73 N. E. 473.

than though it existed solely in one's mind.³ The communication is absolutely essential and is not sufficient that two minds coincide at the same moment.⁴

But if the intention is communicated the mode is immaterial. It may be by mail, by telegraph, by special messenger or the like, as well as by words written or spoken or the acts or conduct of the one who makes it.⁵

Thus where two letters, each containing an offer identical in terms, cross each other, there can be no contract.⁶

§ 13. *Representation on Which Another Acts.—Estoppel.*

A representation concerning a matter of fact may be made to another, without any expressed or intended warranty of the truth, yet with the intention of inducing him to act upon it; and if the latter acts upon it, and suffers loss by reason of it not being true, the party making the representation may be held responsible in law for the consequences; or he may be estopped from denying the truth of the representation.¹

“Where a person makes to another the representation, ‘I take upon myself to say such and such things do exist,’ and the other man does really act upon that basis, it seems to me that it is of the very essence of justice that between these two parties their rights should be regulated, not by the real state

³ Bramwell, B., in *Browne v. Hare*, 3 H. & N. 484, 27 L. J. Exch. 372.

⁴ Post, §§ 21, 26.

⁵ *Howard v. Daly*, 61 N. Y. 362; *Trevor v. Wood*, 36 N. Y. 307; *Perry v. Iron Co.*, 15 R. I. 12, 2 Am. St. Rep. 903; *Stobie v. Earp*, 110 Mo. App. 73, 83 S. W. 1097.

⁶ *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S. W. 1111; *Kleinhaus v. Jones*, 68 Fed. 742. Thus where two letters, each containing an offer identical in terms, cross each other, there can be no contract. *James v. Marion Fruit Jar Co.*, 69 Mo. App. 207; see *Tim v. Hoffman & Co.* (1873), 29 L. T. R. (N. S.) 271; *Contra. Asinoff v. Freudenthal*, 186 N. Y. S. 383. See an interesting case of lack of communication where the parties were in the presence of each other, but one did not hear what the other said, post § 18.

¹ *Lawson, Rights, Rem. & Pr.*, § 2225.

of facts, but by that conventional state of facts which the two parties agree to make the basis of their action.”²

Estoppel in contract law may be described as a rule of evidence which will not permit a person to deny an inference that a reasonable man would necessarily draw from his words and conduct.

§ 14. *Agreement Results from Offer and Acceptance.*

Every agreement necessarily results from an offer on one side and an acceptance on the other.¹ Sometimes they are by words, sometimes by acts, sometimes by both words and acts.²

To illustrate:

(a) At a sale by auction each bid is an offer of a price for the article put up for sale, which bids are successively made until one is accepted by the fall of the hammer, when the agreement is complete.³

² Lord Blackburn, in *Burkinshaw v. Nicolls*, 36 L. T. Rep., N. S. 312; 3 App. Cas. 1026.

¹ *White v. Corlies*, 46 N. Y. 467; *Connor v. Renneker*, 25 C. S. 514.

² *Crook v. Cowan*, 64 N. C. 753; *Fogg v. Portsmouth Atheneum*, 44 N. H. 115, 82 Am. Dec. 191; *Banning Co. v. California*, 240 U. S. 142, 36 Sc. T. 388.

³ *Payne v. Cave*, 3 Term. Rep. 148; *Ives v. Tregent*, 29 Mich. 390. An auctioneer who advertises a sale of certain goods does not by that advertisement alone enter into any contract or warranty with those who attend the sale that the goods shall be actually sold. *Harris v. Nickerson*, 8 Q. B. 286. But where a sale is advertised as *without reserve*, and a lot is put up and bid for, there is a binding contract between the auctioneer and the highest bidder that the goods shall be knocked down to him. *Warlow v. Harrison*, E. & E. 295; *Davis v. Petway*, 3 Head. 664. An auctioneer may refuse a bid tendered in bad faith or proffered by a person who is insolvent or otherwise disabled from completing the purchase; or refuse to accept trifling advances offered by bidders, especially where that kind of bidding is initiated at the outset and the sum so offered is utterly incommensurate with the actual known value of the property. It is reasonable to infer that bidding of that kind would have a depressing effect on the sale and tend to induce a belief on the part of others in attendance that the value of the property had been approximately reached. It is within the legitimate bounds of the discretion of the auctioneer to refuse to accept a bid which is little more than a nominal advance, and, considering the surrounding circumstances, is, in his judgment, likely to affect the sale injuriously. *Taylor v. Harnett*, 26 N. Y. (Misc.) 362.

(b) The time-tables published by a railroad company are an offer made to all persons who apply for carriage that the trains will run as advertised.⁴

(c) The publication of an advertisement of a reward for information, respecting a loss or a crime, or an oral announcement to the same effect, is an offer to any person who is able to give the information asked, and on its acceptance by giving the information the agreement is complete.⁵

(d) The sending of an order to a merchant or manufacturer is an offer to purchase and the sending of the goods is an acceptance of the offer and creates a contract of sale.⁶

(e) An agreement by B to sell A his farm for \$5,000, must be the result of an offer by B to sell it for that price and an acceptance by A or an offer by A to give that sum for it and an acceptance by B.⁷

(f) The purchase of a book or a basket of fruit or other article displayed for sale is the result of the displaying his wares by the seller, who impliedly says, "Will you buy my goods at my price?" and the customer, taking up the article with his cognizance, says, "I will."⁸

(g) The presence of a running street car is a constant offer by the company to perform a service upon its usual terms, and one who enters the car accepts the offer and agrees to pay the usual fare for the service.⁹

(h) A person who takes a seat at the dining table of a hotel

⁴ 9 Cyc. 279; *Denton v. Great North. R. Co.*, 5 E. & B. 860; *Sears v. R. Co.*, 14 Allen 433, 92 Am. Dec. 780.

⁵ *Williams v. Cawardine*, 4 B. and Ad. 621; *Reif v. Page*, 55 Wis. 476, 42 Am. Rep. 731; *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634; *Janvrin v. Exeter*, 48 N. H. 83, 2 Am. Rep. 185; *Hayden v. Souger*, 56 Ind. 42, 26 Am' Rep. 1. The terms of the offer must all be complied with or there can be no recovery. *Williams v. West Chicago R. Co.*, 191 Ill. 610.

⁶ *Harvey v. Johnson*, 6 C. B. 295; *Briggs v. Sizer*, 30 N. Y. 652; *Dent v. Steamship Co.*, 49 N. Y. 370; *Crook v. Cowan*, 64 N. C. 743.

⁷ *Anson, Contr.*, 11.

⁸ *Anson, Contr.*, 11. "If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value." 2 Black. Com. 30.

⁹ *Anson, Contr.*, 13.

offers to take a meal for the usual price charged to guests, and the proprietor accepts the proposal by furnishing the meal.¹⁰

(i) A man with the full knowledge of another does work for him, the latter knowing that he expects to be paid for it; the doing the work is a proposal and the receiving the service without dissent is the acceptance.¹¹

(j) A offers B to pay him a certain sum of money on a future day if B will promise to perform certain services for him before that day. When B makes the promise asked for he accepts the promise offered, and both parties are bound, the one to do the work, the other to allow him to do it and to make the payment.

(k) A sends goods to B's house and B accepts or uses the goods; B is liable on an implied contract to pay what the goods are worth. The offer is made by sending the goods, the acceptance by their use or consumption, which is in fact a promise to pay their price.

(l) A requests B to work for him for hire. On B going to work as requested, the offer is accepted unless A had prescribed in his offer some particular form of acceptance. Or A writes to B offering to reimburse him if he will pay the taxes on certain land. B pays the taxes. This is a sufficient acceptance of the offer.¹²

(m) Whether the manager of a theatre who advertises that at a certain time a particular piece will be performed, stating the price of admission, contracts with one who comes to the theatre door that he will be admitted on payment of the price, and that the piece advertised will be performed, is a question on which there is no judicial authority.¹³

From these examples it will be seen that a *proposal* may

¹⁰ Benj., Princ. of Contr., 18.

¹¹ Id.; DeWolf v. Chicago, 26 Ill. 443; Huck v. Flentye, 80 Ill. 262; Day v. Caton, 119 Mass. 513; Painter v. Ritchey, 43 Mo. (App.) 111.

¹² Allen v. Chouteau, 102 Mo. 302; Agricultural Soc. v. Bromfield, 102 Ind. 146.

¹³ See Pearce v. Spaulding, 12 Mo. App. 144.

assume two forms, the *offer of a promise* and the *offer of an act*, and that *acceptance* may assume two forms also, the *giving of a promise* or the *doing of an act*. And that therefore an agreement may arise in three ways, viz.: (1) In the offer of an act for a promise, as in illustrations (f), (g), (i), (k). (2) In the offer of a promise for an act, as in illustrations (c), (d), (h), (l). (3) In the offer of a promise for a promise, as in illustrations (a), (b), (e), (j).

The unusual case of an offer of an act for an act, may be seen in the continuing offer made by the proprietor of an automatic machine distributing candy, chewing gum, postage stamps and other articles, to persons who put in a coin to obtain something contained in the machine.

§ 15. *Acceptance by Assent.*

The simplest form of offer and acceptance, viz., the offer of a promise and its acceptance by simple assent, is not applicable to the law of contracts except in the single case of contracts under seal. The reason is that in our law no promise, which is not under seal, is binding unless the promisor obtains some benefit in return for his promise, and this benefit is called "consideration."¹ Therefore, if a man says to another, "I will give you \$100," or "I will do such and such a thing for you," the other by simply assenting to the proposal without doing something in return for the promise can not create a binding contract. But if A promises B under seal that he will do a certain act or pay a certain sum, when B has assented to the proposal both are bound, and there is a contract. Until he has assented there is an offer, which is irrevocable so far as A is concerned,² owing to the particular form in which it was made, though it can not bind B until he has assented to it. For a man can not be forced to accept a

¹ See post cap. IV.

² O'Brien v. Boland, 166 Mass. 481, 44 N. E. Rep. 602; McMillan v. Ames, 33 Minn. 257; Williams v. Forbes, 114 Ill. 167, 28 N. E. 463.

benefit, though acceptance is sometimes presumed when the thing is clearly for his benefit.

§ 16. *Acceptance by Promise.*

An offer may be accepted by giving a promise, as where a person offers to pay another a certain sum if he will do something for him on a future day, and the other accepts by promising to do so according to the conditions of the offer. The promise may be either express or implied. It is express where it is proved by what the offeree said; and implied where it is proved that he so acted as to raise an inference that he had made the promise alleged. If a person sends goods to another, and the latter uses the goods, or deals with them as his, he will be liable on an implied promise to pay what the goods are worth, unless he had a right to suppose, and did suppose, that a gift was intended. The acceptance by their use raises an implied promise to pay for them.¹

§ 17. *Acceptance by Act.*

Where the offer is made conditional on the offeree doing something, the doing of the thing required completes the agreement.¹

If A promises B to pay him a sum of money if he will do a particular act, and B does it, the promise thereupon becomes binding, although B at the time of the promise does not engage to do the act. In the intermediate time the obligation is inert or the promise suspended, and until the performance of the condition there is no consideration and the promise is *nudum pactum*; but on the performance of the condition by the promisee it is clothed with a valid consideration which relates back to the promise, and it then became obligatory. So if a reward be offered for the apprehension of a culprit or for the doing of any other lawful act, the promise when made

¹ 9 Cyc. 256; 13 C. J. 274. See Post § 40.

¹ 9 Cyc. 257; 13 C. J. 275; Dick v. Fuller, 213 Fed. 98.

is *nudum pactum*, but when any one relying upon the promised reward performs the condition this is a good consideration for the previous promise and it thereupon becomes binding on the promisor.”²

Pothier mentions many cases in the Civil law where A promises to do something, if B will do something else. There is nothing binding on B, but when he does the act it becomes binding on A.³ So

“when a person says, ‘In case you choose to employ this man for a week, I will be responsible for all sums, as he shall receive, during that time and neglect to pay over to you,’ the party indemnified is not therefore bound to employ him, but if he do employ him, then the guaranty attaches and becomes binding on the party who gave it.”⁴

So if

“I say, ‘if you will furnish goods to a third person, I will guarantee the payment,’ there you are not bound to furnish them, yet if you do furnish them, in pursuance of the contract, you may sue me on my guaranty.”⁵

So if a reward be offered for the apprehension of a culprit or for the doing of any other lawful act, the promise when made is *nudum pactum*; but when any one relying upon the promised reward performs the condition, this is a good consideration for the previous promise, and it thereupon becomes binding on the promisor.”

The every day case of a written order for goods is in point. A man mails an order for certain goods to be sent to him; he receives no reply; the first intimation that the vendor intends to accept the order is the arrival of the goods. If the order is a positive direction to send the goods, it will be enough that the vendor has done so without his having previously notified the vendee of his intention to send them, and

² *Tram v. Gould*, 5 Pick. 30.

³ See *Fishmongers Co. v. Robertson*, 5 M. & G. 171.

⁴ *Kennaway v. Treleavan*, 5 M. & W. 498.

⁵ *Morton v. Burn*, 7 Ad. & Ell. 23.

to accept the offer. Thus, in *Cooper v. Altimus*,⁶ C wrote to A inquiring if he had staves to sell, and A answered: "If you would let me know how much you would give I could get four thousand at \$50 per thousand." C replied: "If they are rift staves and good, I will give \$35 per thousand delivered at the station." A sent the staves without answering, but they were rejected by C on the ground that his last letter was an offer which should have been accepted in order to complete the contract. The court held that the letter was an order which did not call for a reply, and became obligatory on him when the staves were tendered in accordance with its terms.

Another apt illustration of the principle is where a university, in its advertisement for 1892-93, announced that applicants for admission to the law department were required to pay \$50 for the first year and \$40 for each successive year. Plaintiff in 1892 paid \$50 and was admitted to the junior class. The catalogue for 1893-94 stated that law students in all classes were required to pay \$50 a year. In 1893 plaintiff tendered \$40 as the fee for admission to the senior class, which was refused, and he paid the \$50 under protest. It was held that he was entitled to recover the \$10. The student by entering the junior class and paying the \$50 accepted defendant's offer, and no other notice was essential. It was the offer of a promise for an act. No one was obliged to accept defendant's offer; but any one was entitled by its very terms to do so, and plaintiff having done so the contract was complete and binding on defendant. Plaintiff was not under any obligation to take the second year's course, but defendant had not required any promise from him of this kind. Defendant's offer might have said that any person entering the junior class and *agreeing* to take the whole course would be entitled to the stated terms, and in such a case this would have been an offer of a promise for a promise, and if no promise had been made before the withdrawal of the offer there would be no contract.

⁶ 62 Pa. St. 486.

But defendant chose to make its promise in consideration of plaintiff's doing something, *i. e.*, entering the junior class and paying \$50.⁷

§ 18. *Acceptance by Silence.*

Where conduct is relied upon as constituting acceptance it must be something more than mere silence, it must be silence under such circumstances as to amount to acquiescence. Consent can never be presumed from silence when the offer is not communicated to the party to whom it was intended to be made.¹ Nor can a person make another a purchaser in spite of himself by sending goods to him, and demanding the price if the latter does not go to the trouble and expense of returning them and telling him he does not want them.² So an offer either by word of mouth or in writing can not be turned into an agreement simply because the person to whom it is made makes no reply,³ and this even though the offer states that silence will be taken as consent, for the offerer can not prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance.⁴ In *Felthouse v. Bindley*,⁵ an uncle offered by letter to buy his nephew's horse for £30 15s., adding, "if I hear no more about him I consider the horse is mine at £30 15s." No answer was returned to the letter, and it was held that there was no contract.

Circumstances may exist which will impose a contractual obligation by mere silence,⁶ but such circumstances are excep-

⁷ *Niedermeyer v. Curators*, 61 Mo. App. 654.

¹ See Post, § 21.

² *Hobbs v. Massasoit Whip Co.*, 158 Mass. 194, 33 N. E. 495; *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. 622; *Orcutt v. Roxbury*, 17 Vt. 524; *Day v. Eaton*, 119 Mass. 513, 20 Am. R. 347.

³ *Slaymaker v. Irwin*, 4 Whart. 369; *Raysor v. Berkeley County R. Co.*, 26 S. C. 610, 2 S. E. 119; *Titcomb v. U. S.* 14 Ct. Cl. 263; *Cincinnati Equipment Co. v. Big Muddy Co.*, 158 Ky. 247; 164 S. W. 794.

⁴ *Prescott v. Jones*, 69 N. H. 305, 41 Atl. 352.

⁵ 11 C. B. (N. S.) 698.

⁶ *Royal Ins. Co. v. Beatty*, *supra*.

tional and rare; and no legal liability can arise from the silence of the party sought to be affected, unless he was subject to a duty of speech which was neglected to the injury of the other party.

In *Royal Ins. Co. v. Beatty*,⁷ B had two policies of insurance which expired January 6. The day before, his agent went into the office of the company and said to the clerk: "Will you renew the B policies?" The clerk made no reply, but the agent supposed he went to his books to do so. The clerk in an action for the loss of the property by fire on January 10 testified that he did not hear the request and therefore did nothing. It was held that there was no agreement to renew.

"How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing which would be chiefly if not entirely for the jury. But here the utterance was a question and not an assertion and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence either that the question was not heard or that it was not intended to comply with the request. Especially is this the case when if a compliance was intended the request would have been followed by an actual doing of the thing requested. But this was not done; how then can it be said it was agreed to be done? The whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff and no further attempt by the plaintiff to obtain an answer and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract. Nor do I concede that if the defendant heard plaintiff's request and made no answer an inference of assent should be made. For the hearing of a request and not answering it is as consistent, indeed, more consistent, with a dissent than an assent. If one is asked for alms on the street and hears the

⁷ 119 Pa. St. 6.

request but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that defendant heard the plaintiff's request, and without hearing there was of course no duty of speech."

There are cases holding that where a wholesale merchant sends out agents to solicit orders, if he declines to accept the orders, he must notify the persons who have given them to his agents within a reasonable time, or he will be bound.⁸ In another case, a shoe manufacturer had sent to a dealer a lot of shoes, but there was a disagreement as to the terms, whereupon the former wrote: "If our terms are not satisfactory, please return the goods." The dealer not doing so within a reasonable time, it was held an acceptance of the offer.⁹

§ 19. *Acceptance by Signing Paper.*

Where a person signs a document he is not permitted to show that he did not know its terms and, in the absence of fraud, will be bound by all its provisions.¹ When an action is brought on a written agreement which is signed by defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents.² Again the parties may reduce their agreement to writing so that the writing constitutes the sole evidence of the agreement without signing it; and here of course there must be evidence outside the agreement itself to prove that the parties have assented to it; but if this assent be proved, then it is immaterial that

⁸ Peterson v. Graham Shoe Co., 210 S. W. 737; Blue Grass Cordage Co. v. Luthy, 98 Ky. 583, 33 S. W. 835; Cole Co. v. Holloway, 141 Tenn. 679, 214 S. W. 817. But contra, Gould v. Cates Chair Co., 147 Ala. 629, 41 South 675; Metzler v. Harry Kaufman Co., 32 App. D. C. 434; Senner Co. v. Gera Mills, 173 N. Y. Supp. 265.

⁹ Wheeler v. Klaholt, 178 Mass. 197.

¹ Gaither v. Dougherty, 18 Ky. 709, 38 S. W. 2; Barber v. Brooks, 18 La. 453; Phelps v. Clasen, Woolw. 204; Robertson v. Ins. Co., 123 Mo. App. 238, 100 S. W. 686.

² Parker v. R. Co., 2 C. P. D. 416.

one of the parties had not read the agreement and did not know its contents.

§ 20. *Acceptance by Accepting Paper.*

A written offer may be accepted by word of mouth or by acts,¹ and a contract signed by one only of the parties is binding on both if it is assented to by the other.²

“A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form stating the terms on which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is as a general rule bound by its contents and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not.”³

This has been frequently held in the case of bills of lading and receipts issued by express companies and telegraph blanks,⁴ because persons are presumed to understand that such well-known documents contain the terms of the offer,⁵ while on the other hand ordinary railroad tickets, baggage checks or receipts of a similar character have been held not to bind

¹ *Springer v. Cooper*, 11 Ill. App. 267; *Graves v. Smedes*, 7 Dana (Ky.), 344; *Woodlock v. Meyerstein*, 5 Mo. App. 591; *Hoyt v. Schillo Motor Co.*, 185 Ill. App. 628.

² *Sellers v. Greer*, 172 Ill. 549; 50 N. E. 246; *Manufacturers Co. v. Eberncar Co.*, 152 Mo. 73, 138 N. W. 624.

³ *Stephen, J.*, in *Watkins v. Rymal*, 10 Q. B. D. 178.

⁴ *Lawson, Bail.*, § 147.

⁵ “It is quite possible that a person who is neither a man of business nor a lawyer might on some particular occasion ship goods without the least knowledge of what a bill of lading was, but such a person must bear the consequences of his own exceptional ignorance, it being plainly impossible that business could be carried on if every person who delivers a bill of lading had to stop to explain what a bill of lading was.” *Mellish, L. J.*, in *Parker v. R. Co.*, 2 C. P. D. 425.

the receiver to the conditions printed on them, for the reason that he may reasonably have supposed that they contained no special terms but were simply to identify himself or his property.⁶

Nor is one bound by accepting a paper, where the conditions are not readily discernable, as where they are printed on the back of the document or in very small type or are delivered in a dark car or are ambiguous or unreasonable.⁷ And terms brought to the acceptor's notice after the agreement is complete will not bind him.⁸ The reason for this is that the general offer of the carrier is to carry on the usual terms and therefore special terms must be brought to the acceptor's notice in a reasonable manner.

But beyond public agencies like common carriers the presumption of assent does not go. Thus where a collecting agency, which A had employed on several occasions, received a claim from him to collect; and it sent a receipt therefor, on the back of which was printed a clause stating that they did not guarantee clients against loss from the dishonesty of an attorney or the suspension of a bank, but the conditions were never brought to A's attention, he was held not bound by them.

"The appellant calls our attention to a class of cases clearly distinguishable from the one under review. They relate to the construction placed upon the conditions in telegraph blanks, bills of lading, shipping, and express receipts, and other commercial instruments of like description. In such it has been held that the uniform character of those instruments, and the nature of the business to which they relate, create a presumption of knowledge of the attendant conditions and limitations, or that, by using certain blank forms upon which the terms and restrictions confront the subscribing party, he is deemed to have assented to them. No such presumption exists respecting a paper purporting to be an ordinary receipt; hence

⁶ Lawson, Bail., §§ 150, 240.

⁷ 9 Cyc. 262, 13 C. J. 279.

⁸ 9 Cyc. 264, 13 C. J. 279; *Brittain Dry Goods Co. v. Bakersfield*, 51 Pac. 253.

the necessity of proof to establish notice to the plaintiff of the undisclosed clause of exemption from liability, which the defendant inserted in a manner not calculated to attract attention.”⁹

§ 21. *Communication of Offer.*

Whether the offer be by (a) acts or by (b) words it is essential that the offer be communicated.¹

(a) If A does work for B without B's request or knowledge, B can not be held liable to pay for it, because here it is clear that A has not communicated his offer to do the work to B and a man ought not to be forced to pay for what he has no opportunity to reject.² In *Bartholomew v. Jackson*,³ a farmer, seeing his neighbor's stack of wheat in danger of fire, took upon himself to remove it to a safe place, and then sued for his services. But it was ruled that as the offer to remove the stack was never communicated to the defendant there was no contract on which he could be held. In *Taylor v. Laird*,⁴ plaintiff, who had been engaged to command defendant's ship, threw up his command in the course of the expedition but helped to work the vessel home, and then claimed reward for services thus rendered. It was held that he could not recover. Evidence of a recognition or acceptance of services may be sufficient to show an implied contract to pay for them, *if at the time defendant had power to accept or refuse the services*. But in this case defendant never had the option of accepting or refusing the services while they were being rendered, and did in fact repudiate them when he became aware of them. Plaintiff's offer, being uncommunicated, did not admit of acceptance, and could give him no rights against the party to whom it was addressed.

⁹ *Neuman v. Nat. Shoe Co.*, 54 N. Y. S. 942; 56 Id. 193.

¹ *Ante*, §§ 4, 12; 9 Cyc. 252, 254; 13 C. J. 271.

² *Boston v. Dist. of Columbia*, 19 Ct. of Cl. 31; *Seals v. Edmonson*, 73 Ala. 295, 49 Am. Rep. 51; *Chadwick v. Knox*, 31 N. H. 226, 44 A. M. Dec. 329; *Mumford v. Brown*, 6 Cow. 475, 16 Am. Dec. 440.

³ 20 Johns, 28; 11 Am. Dec. 237.

⁴ 25 L. J. Ex. 329.

(b) If A promises to do something if B will do something and B does the act in ignorance of the offer, he can not claim performance of the promise, for the offer was not communicated to him when he accepted it by doing the act.⁵ In *Fitch v. Snedeker*,⁶ defendant had published a notice offering a reward of \$200 to any person who would give information leading to the apprehension and conviction of the person or persons guilty of the murder of a certain female. Through the efforts of plaintiff one F was arrested and convicted, but it appeared that he had done so not knowing of the reward or before it was offered. The court held that there was no agreement.

“To the existence of a contract there must be mutual assent or in another form offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. How can there be consent or assent to that of which the party has never heard.”⁷

⁵ *Ball v. Newton*, 7 Cush. 599.

⁶ 38 N. Y. 242.

⁷ See in accord with this case: *Williams v. West Chicago St. R. Co.*, 191 Ill. 610, 61 N. E. Rep. 456, 85 Am. St. Rep. 278; *Stamper v. Temple*, 6 Humph. 113, 44 Am. Dec. 296; *Hewitt v. Anderson*, 56 Cal. 476, 38 Am. Rep. 65. There are opinions to the contrary. Some of these admit that they are contrary to principle, but think that it is in furtherance of public policy to allow rewards for the recovery of property or the apprehension of a criminal, to be recoverable where the plaintiff did not know of it at the time of rendering the service. Others are based on the old English case of *Williams v. Carwardine*, 4 B. & Ad. 621, which they misunderstand. Here the plaintiff gave information as to a murder “believing that she had not long to live, and to ease her conscience.” Afterwards, she recovered and sued for the reward, and was held entitled to recover. It was not objected to the recovery that she did not know of the offer when she gave the information (for the report is silent as to her knowledge of it), but that the reward was not the motive for her act. The court held simply that the motive was immaterial. *Eagle v. Smith*, 4 Houst. 293; *Dawkins v. Sappington*, 26 Ind. 199; *Auditor v. Ballard*, 9 Bush 572, 15 Am. Rep. 728; *Russell v. Stewart*, 44 Vt. 170. In a New York case motive was considered material, the court saying: “It is a contract obligation. This being so, it must be the voluntary giving up of the information by the person. If corkscrewed out of him by threats, inducing fear of prosecution, no recovery could be had. That would destroy the contract element.” *Vitty v. Ely*, 51 N. Y. 44.

§ 22. *Acceptance of Offer—By Whom.*

A particular offer, *i. e.*, one made to a specified person, can be accepted by him only.¹ An offer by A to sell to B can not be accepted by C, so as to establish an agreement with A.² Such an offer is not assignable.³

But an offer may be general, and then it may be accepted by any one, as where a carrier advertises that he will run his vehicles at certain hours,⁴ where a person offers a prize for a design for a public building,⁵ or a bonus to any one who will make a certain improvement,⁶ or where a bank advertises that it will redeem all bills of a certain class presented to it,⁷ or in the very common case of the offer of a reward for the recovery of property or the arrest of a criminal;⁸ though, as said by Pollock: "We have no special term of art for the proposal thus made by way of general request or invitation to all men to whose knowledge it comes."⁹

¹ *Schmaling v. Thomlinson*, 1 Marsh. 500, 6 Taunt. 147; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Quincy First Nat. Bank v. Hall*, 101 U. S. 43; *Equitable L. Assur. Soc. v. McElroy*, 83 Fed. Rep. 631.

² *Meynell v. Surtees*, 3 Sm. & Gl. 101. Laborers employed by contractors and subcontractors to build a railroad stopped work and were creating a disturbance fearing they would not be paid. The president of the railroad came out and said to them: "Go back to your work and I will see that you are paid." One of the subcontractors who was present and heard the offer brought action for his pay. It was held that the offer was not made to him, and that there was no agreement with him. *Indianapolis R. Co. v. Miller*, 71 Ill. 463.

³ *Boulton v. Jones*, 2 H. & N. 564; *British Wagon Co. v. Lee*, 5 Q. B. D. 149; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9.

⁴ See *Lawson, Bail.*, § 237.

⁵ *Walsh v. St. Louis Ex. Co.*, 90 Mo. 459.

⁶ *Bull v. Talcot*, 2 Root 119, 1 Am. Dec. 62.

⁷ *Tarbell v. Stevens*, 9 Iowa 168.

⁸ *Morrell v. Quarles*, 35 Ala.; *Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634; *Montgomery County v. Robinson*, 85 Ill. 174; *Loring v. Boston*, 7 Mete. 409; *Reif v. Paige*, 55 Wis., 496, 13 N. W. Rep. 473, 42 Am. Rep. 731.

⁹ *Contr.*, p. 13. A person may offer a reward orally as well as by handbill, poster or newspaper advertisement. The latter modes

Such offers, made to an unascertained person or persons, cannot be turned into an agreement until they have been accepted by an ascertained person, but as soon as there is an acceptance by a person within the offer there is a binding agreement.¹⁰

§ 23. *Offerer May Prescribe Time, Place and Conditions of Acceptance.*

The offerer has the right to prescribe the time,¹ place,² form or other condition of acceptance,³ in which case the offer can be accepted only in the way prescribed by the offer.

are more likely to become generally known, but they are no more efficacious as offers than a public offer orally made. Hayden v. Singer, 56 Ind. 42.

¹⁰ See cases in last notes. Bull v. Talcot, 2 Root 119, 1 Am. Dec. 62; Walsh v. St. Louis Ex. Co., 70 Mo. 459; Long v. Battle Creek, 39 Mich. 323, 33 Am. Rep. 384; Babcock v. Raymond, 2 Hilt. 61; Patton v. Hassinger, 69 Pa. St. 305.

¹ The offer may require that it be accepted within a certain time, in which case an acceptance after that time will be of no effect. Longworth v. Mitchell, 26 Ohio St. 342; Potts v. Whitehead, 20 N. J. (Eq.) 55; Britton v. Phillipp, 24 How. Pr. 111; Union Nat. Bk. v. Mills, 106 N. C. 347, 11 S. E. 321; Horne v. Niver, 168 Mass. 4, 46 N. E. 393. An offer by letter may be made conditional upon an acceptance being sent by return mail and the offer must then be accepted within that interval. Maclay v. Harvey, 90 Ill. 525, 32 Am. Rep. 35; Carr v. Duval, 14 Pet. 77; Dunlop v. Higgins, 1 H. L. Cas. 381. The words "by return mail" have been held to give a reasonable time for acceptance, and an answer mailed on the same day the offer was received, though not by the first mail leaving the city after it was received, has been considered sufficient. Palmer v. Phoenix Ins. Co., 84 N. Y. 63; Taylor v. Rennie, 35 Barb. 272. But a delay of three or four days is different. Maclay v. Harvey, supra; Taylor v. Rennie, 35 Barb. 272. An offer requiring acceptance "by return mail" might be accepted by telegram or messenger reaching the offerer as early as the reply would have reached him if sent by return mail, for the words used in the offer would be construed as fixing the time for acceptance and not the manner of accepting. Tinn v. Hoffman, 29 L. T. Rep. N. S. 271; Bernard v. Torrance, 5 G. & J. 383; Taylor v. Rennie, 35 Barb. 272; Minnesota, etc., R. Co. v. Columbus R. Mill Co., 119 U. S. 149, 7 Sc. T. 168.

² In Eliason v. Henshaw, 4 Wheat. 225, E. & Co. offered to buy flour of H., the answer to be sent by the wagon which carried the offer. H. sent a letter of acceptance by mail to another place which was not the destination of the wagon, **having reason to be-**

§ 24. *Acceptance Must Be Absolute and Unconditional.*

The acceptance must be absolute and unconditional.¹ If A offers B to do a certain thing and B accepts conditionally or introduces some new term into his acceptance, his answer is either an expression of a willingness to negotiate or it is in the nature of a counter-proposal on his part.² A counter-proposal is not binding until it is accepted (and communicated) by the original proposer.³

§ 25. *And Identical with Terms of Offer.*

The offer must be accepted exactly as it is made. The acceptance must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting them at all points and closing them

lieve that his answer would in this way reach E. & G. Co. more speedily. The Supreme Court of the United States decided that E. & Co. were not bound by the acceptance, as they had a right to dictate the terms on which they would purchase, and of the importance of which they were the sole judges.

³ Wilcox v. Cline, 70 Mich. 517, 38 N. W. Rep. 555; Perry v. Mt. Hope Iron Co., 15 R. I. 380, 5 Atl. Rep. 632, 2 Am. St. Rep. 902. An offer which requires that it shall be accepted in writing cannot be accepted verbally. Briggs v. Sizer, 30 N. Y. 647; Bosshardt, etc. Co. v. Crescent Oil Co., 171 Pa. St. 109, 32 Atl. Rep. 1120. A person making a proposal may make it a condition that the contract be reduced to writing and signed by both parties, and in such case there is no contract until the written contract is drawn up and signed. The Governor v. Betch, 28 Eng. L. & Eq. 470; McDonald v. Bewick, 51 Mich. 79; Bourne v. Shapleigh, 9 Mo. (App.) 64; Spinney v. Donnerig, 108 Cal. 666. 41 Pac. 797; Sanders v. Pottlitzer Bros., 144 N. Y. 209, 39 N. E. 75.

¹ 9 Cyc. 267; 13 C. J. 280; Roberts v. Cox, 91 Neb. 553, 136 N. W. 831; Pike Co. v. Spencer, 192 Fed. 11, 112 C. C. A. 433; Seymour v. Armstrong, 62 Kas. 720.

² 9 Cyc. 267, 13 C. J. 280; Borland v. Guffey, 1 Grant's Cas. 394; Egger v. Nesbitt, 122 Mo. 667, 27 S. W. Rep. 385, 43 A. M. St. Rep. 596; Kvale v. Keane, 39 N. D. 560. 168 N. W. Rep. 74; Hartford Life Ins. Co. v. Milet, 105 S. W. 144 (Ky.); Wheaton Building Co. v. Boston, 204 Mass. 218, 90 N. E. 598.

³ Briggs v. Sizer, 30 N. Y. 647; Slaymaker v. Irwin, 4 Whart. 367; Nundy v. Matthews, 34 Hun. 74; McLean v. Gymnasium Assn., 64 Mo. (App.) 55.

just as they stand:¹ for there is no contract if there is a variance between the terms of the offer and the acceptance.² In *Jordan v. Norton*³ the defendant offered by letter to buy a mare of the plaintiff if he would warrant her quiet in harness, and the plaintiff replied that he warranted her sound and quiet in *double harness*. In an action for the price Baron Parke said:

“The correspondence merely amounts to this: that the defendant agrees to give twenty guineas for the mare if there is a warranty of her being sound and quiet in harness generally, but to that the plaintiff has not assented. The parties have never contracted in writing *ad idem*.”

Like the conditional acceptance, the acceptance at variance with the terms of the offer is a counter-proposal which to bind the party by whom the original offer was made, must be accepted by him.⁴ So if one makes an offer and accepts acceptance not responsive to the proposal, he is bound by the agreement thus made, and can not fall back on his proposal in case of subsequent disagreement.⁵

§ 26. *Communication of Acceptance.*

An acceptance, which does not go beyond an uncommunicated mental determination, cannot create a binding agreement simply because the intention to accept did in fact exist.¹ If A writes to B and offers to buy B's horse and B makes up

¹ 9 Cyc. 267, 13 C. J. 279; *Eliason v. Henshaw*, 4 Wheat. 225; *Corcoran v. White*, 117 Ill. 118, 57 Am. Rep. 858; *Northwest Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557; *U. S. v. Carlin Co.*, 224 Fed. 859, 138 C. C. A. 449.

² 9 Cyc. 267, 13 Cyc. 279, 13 C. J. 281.

³ 4 M. & W. 155.

⁴ *Sawyer v. Brossart*, 67 Ia. 678, 56 Am. Rep. 371; *Moulton v. Kershaw*, 59 Wis. 316, 48 Am. Rep. 516; *Esmay v. Gorton*, 18 Ill. 483.

⁵ *Iron Works v. Douglass*, 49 Ark. 355; *Treat v. Ullman*, 69 N. Y. (S.) 974; *Tilt v. La Salle Silk Co.*, 5 Daly, 19.

¹ 1 Cyc. 274, 13 C. J. 284; *Felthouse v. Bindley*, 11 C. B. (N. S.) 869; *Brogden v. R. Co.*, L. R. 2 App. Cas. 691; *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; *New v. Ins. Co.*, 171 Ind. 33; 85 N. E. 703; *Kentucky Portland Co. v. Steckel*, 164 Ky. 420, 175 S. W. 663.

his mind to accept, but never tells A of his intention to do so, he has no remedy if A buys a horse elsewhere. In *White v. Corlies*,² C wrote W, "Upon agreeing to finish the fitting up of offices 57 Broadway in two weeks from date, you can commence at once." W immediately purchased lumber for the work and began to prepare it. The next day the proposition was countermanded. It was held that the acceptance was not binding on C, as it was a mere mental determination, unaccompanied by any act indicating to C that his proposal was accepted.

A guaranty like every other contract requires notice of acceptance. It has been laid down by the Supreme Court of the United States that if the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.³

² 46 N. Y. 467; *Cleveland, etc., R. Co. v. Shea*, 174 Ind. 303, 91 N. E. 1081.

³ *Davis Sewing Machine Co. v. Richards*, 116 U. S. 514. But the first sentence in this rule is disapproved in Pennsylvania, where the Court says: "Indeed it is difficult to imagine how precedent request alone can supply the place of subsequent notice, since after request made and proffer of guaranty, the merchant may refuse the credit or advance craved, and without notice the surety cannot know whether he has or has not. So far is this insisted on, that it is said without notice there can be no contract; for like all other contracts, that of guaranty requires both a proposal and acceptance thereof. The reasoning of the Supreme Court of this State is convincing, while for the doctrine of the United States Court no reason is offered, and we feel bound to follow the decisions of our own courts." *Evans v. McCormick*, 167 Pa. St. 247.

But in the rule that acceptance of an offer must be communicated, the word "communicated" does not mean actual notice, for "acceptance is communicated when it is made in a manner prescribed or indicated by the offerer," put in a proper channel to reach the offerer.⁴ An offer is never communicated until it is brought to the knowledge of the offeree, but it is not always necessary that an acceptance should come to the knowledge of the offerer in order to make a binding agreement."

"As notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so: and I suppose there can be no doubt that where a person in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification."⁵

The mental resolve to accept is not enough, as for example to write a letter, seal it and put it in a drawer. The law recognizes only an overt act, which may assume a variety of forms. It may be by the fall of the hammer, by words spoken, by mailing a letter, by sending a telegram, by remitting the article ordered or by the signing and delivery of a paper.

Therefore, we must look to the nature and the terms of the offer if any question should arise as to the adequacy of the method adopted to communicate the acceptance and here a distinction must be made where the offer is (a) of a promise for an act and where it is (b) of a promise for a promise.

(a) In this class of cases it is not intended that the offeree shall express his acceptance otherwise than by performance.

⁴ Cleveland R. Co. v. R. Co., 174 Ind. 303, 91 N. E. 1081.

⁵ Bowen, L. J., in *Carlill v. Carbolic Smoke Co.*, 1 Q. B. 256 (1893), 2 Q. B. 484 (1892).

An offer of reward for the supply of information or for the recovery of a lost article does not contemplate a notice from every person who sees the offer that he intends to search for the information or for the article. This is especially true in the case of general offers made to unascertained persons, wherein performance is expressly or impliedly indicated as a mode of acceptance. As very well said, if I advertise that I will give any one five dollars who finds and restores my dog, I do not expect that people will come to me and tell me they intend to hold me to my offer and will try to earn the five dollars. I expect them to go to work and look for the dog.⁶

The same is true of the everyday case of a written order for goods. A mails an order to B for certain goods in which B deals to be sent to him. He receives no reply; the first intimation that the vendor intends to accept the order is the arrival of the goods. Yet if the order is a positive one, it is not required that B shall first notify A that he accepts his offer and will send the goods—for A's offer is to pay him the price if he will send the goods, not promise to send them.⁷

(b) Where A offers B to do something if B will promise to do something, it is always essential that A shall be notified of B's acceptance and until such acceptance is communicated there is no agreement. But this as we have just seen does not mean that A shall have actual personal notice of the acceptance. If A sends the offer by an agent, notice of the accept-

⁶ *Carlill v. Carbolic Smoke Ball Co.*, supra. In this case defendants, proprietors of a medical preparation, issued an advertisement in which they offered to pay a certain sum to any person who should contract a certain disease after having used their preparation in a specified manner and for a specified period, and it was held that the plaintiff accepted the offer contained in the advertisement and rendered the defendants' promise binding by purchasing the preparation and using it as specified in the advertisement. *Allen v. Chouteau*, 102 Mo. 307, 14 S. W. Rep. 869; *Niedermeyer v. Curators*, 61 Mo. (App.), 654; *Ahern v. Ins. Co.*, 2 Sweeny, 441.

⁷ *Cooper v. Altimus*, 62 Pa. St. 486 *Maugher v. Crosby*, 117 Mass. 330; *Briggs v. Sizer*, 30 N. Y. 648; *Harvey v. Johnson*, 6 C. B. 295.

ance given to that agent is sufficient; it is "communicated" to A in the eye of the law.

In a variety of ways an acceptance may be communicated without the offerer actually receiving notice of it; and it is always sufficient that the offer be accepted in the mode either expressly or impliedly required by the offerer, and if the offerer requires or suggests a mode of acceptance which turns out, so far as giving actual notice to the offerer is concerned, to be insufficient or entirely nugatory, it is the fault of the offerer and the agreement is complete.

"Suppose that X sends an offer to A by messenger across a lake with a request that A, if he accepts, will at certain hour fire a gun or light a fire. Why should A suffer if a storm render the gun inaudible, or a fog intercept the light of the fire? If X sends an offer to A by messenger with a request for a written answer by bearer, is it A's fault if the letter of acceptance is stolen from the bearer's pocket? If X has asked for a verbal answer and the messenger who is told to say 'yes' is struck with paralysis on the way home, it would seem unreasonable to say that no contract has been made."

In *Howard v. Daly*,⁹ plaintiff, an actress, received from defendant, the manager of a theatre, an offer to engage her for a year. She wrote a note accepting the offer, which she placed in a letter box on the door of his office. It was proved that this box was used for depositing contracts between the management and the actors. Defendant denied that he had ever received the letter.

"This is immaterial. The minds of the parties met when the plaintiff complied with the usual or even occasional practice and left the acceptance in a place of deposit recognized as such by the defendant. This doctrine is analogous to that which has been adopted in the case of communication by letter or by telegraph. The principle governing these cases is that there is a concurrence of the minds of the parties upon a distinct proposition manifested by an overt act. The deposit in the box is such an act."

⁸ Anson, Contr., 30, 31.

⁹ 61 N. Y. 362; *Brooks v. Ostrander*, 158 Ill. App. 78.

If one writes to another, "If you choose to employ A, I will be responsible for him," or "If you will sell goods to C, I will guarantee their payment," ordinarily it is not necessary to notify the offerer of the acceptance, the doing of the act being sufficient. But where A wrote B, "If Harry needs more money, let him have it or assist him to get it, and I will see you paid," the Court said:

"But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time, after doing that which constitutes the acceptance."¹⁰

§ 27. *Offer Made by Post.*

As between the sender of a letter and the person to whom it is addressed, the post-office is the agent of the sender.¹ Therefore, the delivery of a letter to the post-office for transmission is no delivery or communication to the person to whom it is addressed until actually received by him.² An offer by mail continues open until the letter is delivered to the offeree, and the offerer must suffer the consequence of any delays or mistakes on the part of the post-office.³ In *Adams v. Lindsell*,⁴ defendants offered to sell wool to the plaintiffs by letter dated September 2d, 1817. The letter was misdirected, and so did not reach the plaintiffs until September 5th; they accepted by letter posted that evening, but defendants had in the meantime sold the wool to others. Plaintiffs sued for non-delivery of the wool, and it was argued on behalf of defendants that no contract could arise until plaintiffs' answer reached him. But the court said:

"That if that were so no contract could ever be completed by the post. For if the defendants were not bound by their

¹⁰ *Bishop v. Eaton*, 161 Mass. 498.

¹ *Frith v. Lawrence*, 1 Paige, 434; *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262; *Averill v. Hedge*, 12 Conn. 424.

² The post-office has been sometimes likened to an agent appointed by the sender of the offer to deliver it and to receive and

bring back the acceptance, and it is argued, If I send my clerk or other agent to B with a written offer and B tells him he accepts, the contract is complete, for his communication to the agent is notice to me. But it is clear that the post-office is not this kind of an agent. As Mr. Wald very well puts it: "If a man afflicted with partial deafness were to make a proposal and the reply were to be spoken into his ear trumpet, or if a proposal were made by telephone and the reply were to be given by the same means, no one would think of calling the ear trumpet or telephone the proposer's agent to receive the acceptance. The post, the ear trumpet and the telephone are respectively the agencies employed to make known the acceptance, but not the agents to receive it. Moreover, acceptances by mail are not made known to the post-office officials; the contents of letters are not supposed to come to their knowledge; but if an acceptance does not become effective until it is made known, then when an agent is appointed to receive it, it can have no effect until it is made known to him, so that the fiction of considering the post-office such agent only moves the difficulty one step forward without solving it." Wald Pollock Contr., p. 36. The same criticism is made by one of the judges in *Henthorn v. Frasier*, where he says, "In his judgment Thesiger, L. J., refers to the cases in which the decision in *Dunlop v. Higgins* has been explained by saying that the post-office was treated as the common agent of both parties. That reason is not satisfactory. The post-offices are only carriers between them. They are agents to convey the communication, not to receive it. The communication is not made to the post-office, but by their agency as carriers. The difference is between saying 'Tell my agent A if you accept' and 'Send your answer to me by A' (i. e. in writing). In the former case A is to be the intelligent recipient of the acceptance, in the latter he is only to convey the communication to the person making the offer, which he may do by a letter, knowing nothing of its contents. The post-office are only agents in the latter sense.' Some judges treat the post-office as the agent in the restricted sense, just like a servant sent to receive the letter of acceptance, and (because the regulations of the English post-office and of ours, too, at the time these cases were decided, did not permit the letter to be recalled by the writer after it is posted) instructed not to let the letter out of his possession after once given to him. In the English cases it is always assumed that the letter on being posted is beyond the control of the sender. See *Broden v. R. C.*, 2 App. Cas. 691. where Blackburn, J., says: "He may change his mind, but cannot recover the letter from the post-office" (*Dunmore v. Alexander*, 9 S. & D. 190; *Langdell's Cases on Contracts*.) Mr. Justice Holmes puts it this way: "The offeree when he drops the letter containing the counter promise into the letter box does an overt act which by general understanding renounces control over the letter, and puts it into a third hand for the benefit of the offerer with liberty to the latter at any moment thereafter to take it." (Common Law, p. 306.)

³ 9 Cyc. 294, 13 C. J. 301.

⁴ 1 B. & Ad. 681.

offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on *ad infinitum*. The defendants *must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs; and then the contract is concluded by the acceptance of it by the latter.*"

In like manner where a person making an offer by telegraph, the company becomes his agent to carry the offer and he is responsible for any error made in transmitting the message.⁵

§ 28. *Acceptance Made by Post.*

Where a person makes an offer, and requires or authorizes the offeree either expressly or impliedly to send his answer by post and the answer is duly posted, the contract is complete from the time the letter is mailed, and it is immaterial, that afterwards the letter be delayed or altogether fail in reaching its destination, by default of the post-office or by accident in transmission.¹ As soon as the letter is delivered to the post-office the contract is as complete as if the acceptor had put it into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance.² The contract is properly held to be complete when the acceptor has mailed the letter of acceptance, because this is an act contemplated and impliedly authorized by the offerer

⁵ *Ayer v. Tel. Co.*, 79 Me. 493, 1 Am. St. Ry. 353; *Contra* in Eng. land, *Henkel v. Pope*, L. R. 6, Ex. 7.

¹ The sending or accepting an offer by telegraph is governed by the same rules. *Tuttle v. Jackson*, 36 N. Y. 309; *Minn. Oil Co. v. Collier Lead Co.*, 4 Dill, 431; *Weld Co. v. Victory Co.*, 205 Fed. 770. And, of course, an offer may be accepted through the telephone. *Dudley Tyng Co. v. Converse*, 180 Mich. 195, 146 N. W. 629; *Burton v. U. S.*, 202 U. S. 344, 26 Sc. T. 688.

² 9 Cyc. 295, 13 C. J. 300; *Taylor v. Ins. Co.*, 9 How. 390; *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; *Moore v. Pierson*, 6 Iowa, 279, 71 Am. Dec. 409; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Kempner v. Cohn*, 47 Ark. 519, 58 Am. Rep. 775; *Haas v.*

as the mode of manifesting the intention of the acceptor to close with the offer. The acceptor by this act does all that is requisite in the usual course of business—he thereby puts the letter of acceptance beyond his control, and he is not answerable for the casualties of the mail service.³

Myers, 111 Ill. 426, 53 Am. Rep. 674; *Trounstone v. Sellers*, 35 Kan. 447, 11 Pac. 441; *Calhoun v. Atchison*, 4 Bush 261, 96 Am. Dec. 299; *Postal Tel. Co. v. Louisville Cotton Co.*, 140 Ky. 506, 131 S. W. 277; *Wester v. Casein Co.*, 206 N. Y. 506, 100 N. E. 488; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380, 5 Atl. Rep. 632, 2 Am. St. Rep. 902. Contra in Massachusetts, *McCullough v. Eagle Ins. Co.*, 1 Pick. 278. But see *Brauer v. Shaw*, 168 Mass. 198. This rule will not be extended to make communication by mail to the offeree's agent a sufficient acceptance, though accompanied by a direction to give notice. *New v. Ins. Co.*, 171 Ind. 33, 85 N. E. 703.

³ The English courts did not at once arrive at the American doctrine. In *Adams v. Lindsell*, 1 B. & Ald. 681, it was ruled that the post-office was the agent of the offerer, and that he was liable for its defaults. "In *Dunlap v. Higgins*, 1 H. L. Cas. 381," says Mr. Anson (*Contr.* 23.) "Lord Cottenham held, though it was not necessary to the decision of the case, that the posting of a letter of acceptance concluded the contract whatever might afterwards befall the letter. But the Court of Exchequer, in a later case, *British Am. Tel. Co. v. Colson*, L. R. 6 Ex. 108, tried hard to escape the consequences of the rule, and Kelly, C. B., laid it down that the contract was not binding till the letter of acceptance was received, but that when it was received its operation related back to the moment of its posting. This decision was virtually overruled in *Harris' case*, L. R. 7 Ch. 587; as to the moment when the contract was complete, but Mellish, L. J., said that, though 'complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted.' But it is now settled, in *Household Fire Insurance Company v. Grant*, 4 Ex. Div. 216, that the parties are bound, from the moment the letter is put in course of transmission, by a contract, the existence of which is unaffected by the subsequent fate of the letter. The contract does not remain, up to the moment the acceptance is received in the state of suspended animation contemplated by Kelly, C. B.; nor is it subject to the condition subsequent suggested by Mellish, L. J." Street letter boxes are a legal part of the post-office system, and a letter deposited in one of these boxes is considered as being delivered or mailed at the post-office. *Wood v. Callaghan*, 61 Mich. 402; 1 Am. St. Rep. 597; *Watson v. Russell*, 149 N. Y. 388. In England, handing a letter to a town postman is a posting of it. *Re London & Northern Bank*, 1 Ch. 220 (1900). But in *Pearce v. Langfit*, 101 Pa. St. 511, it is said: "It certainly can make no difference whether the letter is handed directly to the carrier or is first de-

The implied authority to use the post to communicate the acceptance arises (a) where the post is used to make the offer, but nothing is said as to how the acceptance is to be made;⁴ (b) where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance.⁵

In *Henthorn v. Fraser*,⁶ H, who lived at Birkenhead, a town near Liverpool, called at the office of a land society in Liverpool to negotiate for the sale of some houses belonging to him. The secretary there handed him a written offer for his property, which he took away with him. On the next day the secretary posted a withdrawal of the offer. The letter containing the withdrawal was posted between twelve and one o'clock and did not reach Birkenhead until after five p. m. In the meantime H had, at three-fifty p. m., placed in the post-office at Birkenhead a letter accepting the offer, which did not actually reach the secretary's office until the next day. It was held that the contract was complete when the letter containing the acceptance was posted at Birkenhead. The ground of this decision was that though H received the offer at Liverpool, he resided in another town; as by its terms it was to remain open for some days, it was plainly intended that he should take it home with him and consider it; and it

posited in the receiving box and taken from there by the carrier. The postal regulations of the United States require that carriers, while on their rounds, shall receive all letters, prepaid, that may be handed them for mailing." The letter must be properly addressed and stamped. *Britton v. Phillips*, 24 How. Pr. (N. Y.) 111; *Blake v. Fire Ins. Co.*, 67 Tex. 160, 2 S. W. 368, 60 Am. Rep. 15; *Potts v. Whitehead*, 20 N. J. Eq. 55.

⁴ *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339; *Abbott v. Shepard*, 48 N. H. 14; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Levy v. Cohen*, 4 Ga. 1; *Falls v. Gather*, 9 Port, 614; *Averill v. Hedge*, 12 Conn. 436; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 88; *Potts v. Whitehead*, 20 N. J. (Eq.) 55. "If this is satisfactory let us know by return mail," authorizes the offeree to accept by return mail. *Allen v. Woolf River Co.*, 169 Wis. 253, 172 N. W. 158.

⁵ *Henthorn v. Fraser*, post.

⁶ 2 Ch. 27 (1892); *Bruner v. Moore*, 1 Ch. Div. 804 (1904).

is clear that the ordinary mode, the mode which both parties under all the circumstances must have contemplated, was that if he accepted he would do so by the mail.⁷

Of course where the actual receipt of the acceptance is made a condition of the offer the rule above does not apply, as where after proposing the terms of an agreement the offerer added, "Telegraph me yes or no. Unless I receive your answer by the 20th I shall conclude no"—here the offer was held dependent on the actual receipt of the letter or telegram of acceptance on or before the time named.⁸

§ 29. *The Subject of Acceptance by Agent Reviewed.*

From the foregoing sections we draw these conclusions: That the acceptance of an offer must be communicated to the offerer; that it is communicated to him when it is delivered to his agent or messenger; that the post-office and telegraph are his agents respectively when he expressly makes them so by requesting a reply by mail or telegraph or when he impliedly makes them so by using these agencies to make his offer or when the circumstances are such that it must have been within the contemplation of the parties that according to the usages of mankind the post might be used as a means of communicating the acceptance, but that the offerer may if he chooses make the acceptance conditional upon its actual receipt by him.

A few simple illustrations will suffice:

(1) A sends an offer to B by his, A's messenger, into whose hands B delivers his acceptance. (2) A makes B an offer by mail, requesting a reply by mail. B mails his acceptance. (3) A makes an offer to B by mail, saying nothing as to how the acceptance is to be made. B mails his acceptance. (4) A makes an offer to B in the City of L. by handing him a letter

⁷ But where an offer is made of advertisement, there is no completed contract until the letter reaches the offeree. *Haldane v. U. S.*, 69 Fed. 819, 16 C. C. A. 447.

⁸ *Lewis v. Browning*, 130 Mass. 173; *Haas v. Myers*, 111 Ill. 42.

containing the offer, and giving him 14 days in which to accept. B lives in the City of B. Within the time B mails an acceptance to A.

Here the acceptance is "communicated" to A and the contract is complete, though A never receives any of the acceptances.

(5) C sends an offer to D by his, C's messenger. D examines it and immediately sends his own clerk or servant with his acceptance to C. (6) C sends an offer to D by his servant and D immediately mails his acceptance. (7) C makes an offer by advertisement in a newspaper. D mails an acceptance. (8) C makes an offer to D by mail, and D dispatches his clerk to C with his acceptance. (9) C makes an offer to D by mail conditional on the acceptance being received by him by a certain day. D mails his acceptance to C.

Here there is no communication of the acceptance to C until he actually receives it, and if it is lost on the way there is no contract.

§ 30. *Acceptance Makes Irrevocable Contract.*

An offer binds no one, and, as we shall see, may be revoked or lapse before acceptance. But acceptance by promise or act duly communicated before revocation or lapse supplies the element of agreement and binds both parties to the fulfillment of the terms of the contract. It changes the character of the offer, making it an irrevocable promise.¹

Where an offer is accepted before it is revoked the contract is as obligatory as if both promises were simultaneous. Here, as in other like cases, if both parties meet, one prepared to accept and the other to retract, whichever speaks first will have the law with him; and this question is one of fact to be decided by the jury.²

¹ 9 Cyc. 283, 295, 13 C. J. 293, post § 37.

² Martin v. Hudson, 81 Cal. 42, 22 Pac. Rep. 296; Quick v. Wheeler, 78 N. Y. 300.

§ 31. *Offer May Lapse or Be Determined, How.*

Since an offer may be turned into a contract by acceptance it is important to know how this liability may be terminated. And the modes in which an offer may lapse or be determined before acceptance are, (a) by revocation, (b) by rejection, (c) by efflux of time, (d) by breach of condition, (e) by death, (f) by change of circumstances.

§ 32. *By Revocation.*

An offer whose acceptance has not been communicated to the offerer does not constitute an agreement and cannot bind him, and therefore it may be withdrawn or revoked by him at any time before it is so accepted.¹ At an auction sale the bid is not binding until assented to, which assent is signified on the part of the seller by knocking down the hammer. Therefore a bid may be withdrawn at any time before the hammer goes down.²

A party may revoke his offer even if the offer gives a definite time for acceptance, for the agreement to keep the offer open is without consideration.³ But where the agreement is itself founded on a valuable consideration,—as where in consideration of a certain sum of money an option to purchase is given to another for a certain time—the offer cannot be retracted during that time.⁴ This has been criticised on the ground that there can be no meeting of the minds of the parties after the offer has been withdrawn and the retraction communicated to the other party, and there can be no contract of sale in such a case, though the retraction would be a

¹ 9 Cyc. 284, 13 C. J. 295; *Bennett v. Potter*, 16 Cal. App. 183, 116, p. 681; *Prior v. Hilton Co.*, 141 Ga. 117, 80 S. E. 559.

² *Payne v. Cave*, 3 Term. Rep. 148; *Ives v. Tregent*, 29 Mich. 390; *Fisher v. Seltzer*, 23 Pa. St. 308.

³ 9 Cyc. 285, 13 C. J. 295; *Minneapolis, etc., R. Co. v. Mill Co.*, 119 U. S. 149, 151.

⁴ 9 Cyc. 286, 13 C. J. 295.

breach of the contract to leave the offer open and the measure of damages would be the same.⁵ But the proper rule would seem to be that an offer of this kind should be treated as a conditional covenant to convey and subject on the performance of the condition within the time limited, to specific performance.⁶

An offer under seal cannot be revoked, at common law. Even though it is not communicated to the offeree it remains open for his acceptance when he becomes aware of its existence. This results from the common law rule that a grant under seal is binding on the grantor and those who claim under him, although it has never been communicated to the grantee, if it has been duly delivered; and any obligation created by deed is on the same footing. The promisor is bound, but the promisee need not take advantage of the promise unless he chooses.⁷ The rule that where an offer is made under seal it cannot be revoked applies to options given under seal.⁸

The revocation of the offer must be communicated to the person to whom the offer was made before or at the time of his communicating the acceptance.⁹

⁵ Tiedeman, Sales, § 41.

⁶ *Zimmerman v. Brown*, 36 Atl. 676; *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. Rep. 73; *Mansfield v. Hodge*, 147 Mass. 304.

⁷ 9 Cyc. 288, 289, 13 C. J. 295; *Xenos v. Wickam*, L. R., 2 H. L. 296; *Kershaw v. Kershaw*, 102 Ill. 307; *Wing v. Chase*, 35 Me. 260; *Willard v. Tayloe*, 8 Wall, 557.

⁸ *McMillan v. Ames*, 33 Minn. 257, 22 N. W. Rep. 612; *O'Brien v. Boland*, 166 Mass. 481, 44 N. E. Rep. 602; *Thomason v. Bescher*, 176 N. C. 622, 97 S. E. Rep. 654; and see 1 A. L. R. Am. 631.

⁹ 9 Cyc. 288, 13 C. J. 295. Where the offer is made by mail, a second letter sent by the same post and delivered at the same time with the first letter (*Sherman v. National Cash-Register Co.*, 5 Colo. App. 162, 38 Pac. 392; *Dunsmore v. Alexander*, 9 Shaw D. & B. 190), or a letter or telegram received by the offeree before he has posted his acceptance would be sufficient (Re London, etc., Bank, 81 L. T. Rep. N. S. 512.)

The case of *Cooke v. Oxley*, 3 T. R. 653, 1 Rev. Rep. 783, has been often criticised. In this case the declaration was that the defendant proposed to sell and deliver a certain number of hogsheads of tobacco to the plaintiff at a certain price, whereupon the

Where the negotiations are by mail, the offer is presumed to have been renewed during every moment of the time limited, and upon this presumption the acceptor has the right to rely and conclude the contract by acceptance at any time before receiving notice of a withdrawal.¹⁰ Therefore, a revocation of the offer which is not notified to the person to whom the offer has been made, or which is brought to his knowledge after he has communicated his acceptance of the offer, is altogether inoperative; as in the case of a letter of

plaintiff desired the defendant to give him time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed, and thereupon promised the plaintiff to sell and deliver the tobacco upon the terms aforesaid, if the plaintiff would agree to purchase the same and give notice to the defendant before four in the afternoon of that day. The plaintiff then averred that he agreed to purchase the tobacco and give notice thereof to the defendant before the hour of four arrived, and offered to pay the price, but that the defendant refused to comply with his promise. A verdict having been rendered for the plaintiff the judgment was arrested. Some American judges, construing the decision to be that where an offer gives a specified time for acceptance an acceptance within that time does not make a binding agreement, have ruled, citing it as authority, that notice of the revocation of an offer is not necessary. See *Bean v. Burbank*, 16 Me. 458, 33 Am. Dec. 681; *Tucker v. Woods*, 12 Johns. (N. Y.) 190, 7 Am. Dec. 305; *Gillespie v. Edmonston*, 11 Humph. (Tenn.) 553. But the decision turned on a point of pleading. The contract declared on that the defendant would give the plaintiff until four in the afternoon to decide, was clearly not a binding contract at all, and the declaration did not show with sufficient distinctness that the defendant had not withdrawn the offer before the plaintiff notified him of the acceptance. The case is explained in a later English case where the court says in substance: All that *Cooke v. Oxley*, 3 T. R. 653, 1 Rev. Rep. 783, affirms is, that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires. The offer may be revoked before acceptance. If the offer is not retracted, it is in force as a continuing offer until the time for accepting or rejecting it has arrived. *Stevenson v. McLean*, 5 Q. B. D. 346. And in *Boston, etc., R. Co. v. Bartlett*, 3 Cush. 224, 228, *Fletcher, J.*, says: "The case of *Cooke v. Oxley*, 3 T. R. 653, 1 Rev. Rep. 783. . . . has been supposed to be inaccurately reported; and that in fact there was in that case no acceptance. But, however, that may be, if the case has not been directly overruled, it has certainly in later cases been entirely disregarded, and can not now be considered as of any authority."

¹⁰ *Larmon v. Jordan*, 56 Ill. 204; *Moore v. Pierson*, 6 Iowa 278; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339.

revocation not delivered until after the offer contained in a former letter has been accepted by posting the letter of acceptance, although it may have been posted before the acceptance of the offer was mailed.¹¹

In *Bryne v. Van Tienhoven*,¹² defendant, writing from C on October 1st, made an offer to plaintiff asking for a reply by cable. Plaintiff received the offer on the 11th, and at once accepted in the manner requested. On the 8th defendant had posted a letter revoking his offer. It was held that an acceptance made by post is not affected by the fact that a letter of revocation is on its way.

“If the defendant’s contention were to prevail no person who had received an offer by post and had accepted it, would know his position until he had waited such time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principle and practical convenience require that a person who has accepted an offer not known to him to have been revoked, shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties.”

A formal notice is not, however, necessary to constitute a communicated revocation. It is sufficient that the person making the offer does some act inconsistent with it and making performance on his part impossible, as, for example, selling the property in question to another purchaser, and that the person to whom the offer was made has knowledge of such act.¹³

“It is usually said that an offer does not bind the offeror and this is true in the sense that he may withdraw the offer

¹¹ 9 Cyc. 288, 13 C. J. 295; *Kempner v. Cohn*, 47 Ark. 519; *Moore v. Pierson*, 6 Iowa 279, 71 Am. Dec. 409; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28.

¹² C. P. D. 344.

¹³ *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. Rep. 869, 58 Am. Rep. 775; *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. Rep. 284, 6 Am. St. Rep. 417; *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28; *Peck v. Freeze*, 101 Mich. 321, 59 N. W. R. 600; *Dickinson v. Dodds*, 2 Ch. D. 463; *Craig v. Harper*, 3 Cush. 158.

by taking timely and proper steps. But it is not true that it places no responsibility upon him. Everyone is responsible for his actions and if he makes an offer he must take the consequences. No matter what diligence he may use in striving to recall such offer it will not avail unless he actually succeeds in doing what the law requires for a revocation. If after such endeavor he fails, the offer which thus continues may be accepted and a contract arise in spite of the offeror's efforts. Thus if one makes an offer to another designating one year as the time it shall continue and such offeree goes to the wilds of Africa, it may well happen that the offeror may be unable to communicate a change of mind and a contract arise in spite of attempts to make known such change of intention."¹⁴

A general offer to the public may be revoked without actual notice to the party who may afterwards accept it without knowing of its revocation or withdrawal, if the revocation be made in the same way as the offer was made.¹⁵ In *Shuey v. United States*¹⁶ the government by a published proclamation had offered a reward for information which would lead to the arrest of a certain criminal. It was afterwards withdrawn by the same kind of notice. So afterwards, and not knowing of the revocation, gave the information. But it was held that there was no agreement to pay the reward.

"There was no contract until its terms were complied with. Like any other offer of a contract, it might therefore be withdrawn before rights had accrued under it..... True it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made."

For the same reason, offers contained in time tables pub-

¹⁴ Ashley, Contr. § 20.

¹⁵ *Shuey v. U. S.*, 92 U. S. 73.

¹⁶ *Supra*.

lished by railroads may be withdrawn by notice to that effect given in such subsequent publications.¹⁷

But the revocation must be in good faith. Thus where the defendant offered a share of his profits to any employe who should have been in his service 4500 hours during 100 consecutive days and should not be discharged during the year and the plaintiff worked all the year until December 30, when he was dismissed by the defendant, it was held that he was entitled to recover his share of the profits for that year.¹⁸

§ 33. *By Rejection or Conditional Acceptance.*

If the offer made is rejected, the party making it is relieved from liability on that offer and one who has rejected it cannot afterwards convert the same offer into an agreement by acceptance; to do so he must have the renewed consent of the person who made the offer.¹ A conditional acceptance or an acceptance not in accordance with the terms of the offer has the same effect; it is, a counter-proposal and a virtual rejection of the original offer.² Therefore a subsequent acceptance of the original proposal operates only as a new counter-proposal which the original proposer may either accept or reject.³ In *Hyde v. Waerch*,⁴ A proposed to sell a farm to B for £1,000; B said he would give £950. A refused this offer, and then B said that he was willing to give £1,000. A was no longer ready

¹⁷ *Sears v. R. Co.*, 14 Allen 433, 92 Am. Dec. 780; *Thayer v. Burchard*, 99 Mass. 508.

¹⁸ *Zwolaneck v. Baker Co.*, 150 Wis. 517.

¹ *James v. Darby*, 100 Fed. Rep. 228, 229, 40 C. C. A. 341; *Sheffield Canal Co. v. R. R. Co.*, 3 Rail & Canal Cas. 132; *Davis v. Parrish*, Litt. Sel. Cas. 153; 12 Am. Dec. 287.

² *Gallagher v. Gas Light Co.*, 141 Cal. 699, 75 Pac. 329; *Wittner v. Hurwitz*, 216 N. Y. 259, 110 N. E. 433; *Poel v. Brunswick Co.*, 216 N. Y. 310, 110 N. E. 619; *McRae v. Ross*, 170 Cal. 74, 148 Pac. 215.

³ 9 Cyc. 290, 13 C. J. 296; *Carr v. Duval*, 14 Pet. 77; *Minn.*, etc., R. Co. v. Mill Co., 119 U. S. 147; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; *Northwestern Iron Co. v. Meade*, 21 Wis. 474, 94 Am. Dec. 557; *Clay v. Ricketts*, 66 Ia. 362, 23 N. W. Rep. 755.

⁴ 3 Beav. 334.

to adhere to his original proposal and B endeavored to obtain specific performance of the alleged contract. But it was held that his offer to buy at £950 in answer to A's offer to sell for £1,000 was a refusal of the offer of A and a counter-proposal and that he could not after this, without A's consent, hold him to his original offer.

To constitute a rejection of the offer there must be a distinct counter-proposition.⁵ A mere inquiry whether the offerer would change his terms, will not be a rejection of the original offer so as to prevent a subsequent acceptance of it.⁶ Nor will an inquiry as to how remittance shall be made,⁷ or a suggestion that the business shall be transacted through a bank instead of a person.⁸ An immaterial condition does not constitute a rejection,⁹ nor a condition which the law implies.¹⁰

⁵ "It is believed that this position is sound. . . . Singularly enough, there appears to be no decision involving the point and the various textbooks do not refer to it." Ashley, Contr. § 18.

⁶ *Stevenson v. McLean*, 5 Q. B. D. 346; *Portage Rubber Co. v. Fruin*, 186 Ill. App. 11. Or expressions of hope or suggestions or requests. *Id.*

⁷ *Clark v. Dales*, 20 Barb. 42.

⁸ *Brisban v. Boyd*, 4 Paige (N. Y.) 17, and see *Stotesbury v. Masengale*, 13 Mo. (App.) 221; *Brown v. Cairns*, 63 Kan. 393, 66 Pac. Rep. 1033.

⁹ 9 Cyc. 291, 13 C. J. 297; *Bonnerve v. Jenkins*, 8 Ch. D. 70. In this case the agent of an intending purchaser having made an offer for the property received in reply a letter from the vendor's agent accepting the offer and fixing a time for signing the contract. The purchaser's agent not appearing at the time named the vendor refused to complete. But it was held that this was no defense. The naming of the time did not make the acceptance a conditional one. So if the letter shows a complete contract, it will take effect in spite of a statement in the acceptance that a formal contract will be drawn up. *Green v. Cole*, 103 Mo. 76; *Bonnerve v. Jenkins*, L. R. 8 Ch. D. 70; *Blaney v. Hope*, 14 Ohio St. 292; *Mackey v. Mackey*, 29 Gratt. 158; *Bell v. Offut*, 10 Bush. 632; *Allen v. Chouteau*, 102 Mo. 309. When land is offered for sale by letter, acceptance specifying that payment is to be made at the place of the purchaser's residence is not unconditional, the terms of the offer entitle the vendor to payment at his own place of residence. *Baker v. Holt*, 56 Wis. 100; *Sawyer v. Brossart*, 67 Iowa 678; *Northwestern Iron Co. v. Meade*, 21 Wis. 474; *Gilbert v. Baxter*, 32 N. W. Rep. (Ia.) 364; *Maynard v. Tabor*, 53 Me. 511; *Fenno v. Weston*, 31 Vt. 345; *Siebold v. Davis*, 67 Ia. 560; *Langellier v. Schaefer*, 36 Minn. 361, 31 N. W. Rep. 690.

¹⁰ As a condition in response to an application for a loan that the

§ 34. *By Lapse of Time.*

If the offerer has prescribed the time within which it is to be in force, on the expiration of that time it comes to an end without any further act or notice on his part.¹

If no time is fixed within which the offer is to be accepted, it will lapse after the expiration of a reasonable time.² The person who makes the offer is presumed to act in view of existing circumstances, and the person to whom it is addressed ought not to lie by until these have changed. He must therefore decide forthwith; otherwise an offer might be accepted after the lapse of months or years, and when the state of things was no longer the same.

What is a reasonable time will depend on the nature of the offer and the surrounding circumstances.³ An offer to buy or sell land would not require so prompt an acceptance as an offer to buy or sell chattels, corporate stock, etc., of a perishable character or of fluctuating value.⁴ So if an article is offered for sale today at a certain price, and the buyer does not agree and goes away a larger sum may be asked tomorrow when he returns prepared to buy.⁵

acceptor will make the loan when his attorney advises him that the title is good. *Morse v. Tillitson Co.*, 253 Fed. Rep. 340, and see 1 A. L. R. Am. 1508.

¹ 9 Cyc. 291, 13 C. J. 297; *Longworth v. Mitchell*, 26 Ohio St. 334; *Potts v. Whitehead*, 20 N. J. Eq. 55, 59; *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35; *Ackerman v. Maddox*, 26 N. D. 50, 143 N. W. 147; *Richardson v. Harding*, 106 U. S. 252, 1 Sc. T. 213.

² 9 Cyc. 291, 13 C. J. 297. Offer to sell real estate; delay of five days in accepting not unreasonable. *Kempner v. Cohn*, 47 Ark. 519; delay of two weeks unreasonable. *Ortman v. Weaver*, 11 Fed. 358. Delay of six days in offer to sell manufactured goods unreasonable. *Hargadine v. Reynolds*, 64 Fed. 560.

³ 9 Cyc. 292; *Averill v. Hedge*, 12 Conn. 424; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 752; *Crabtree v. St. Paul Opera House Co.*, 39 Fed. 746; *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431; *Ramsgate Hotel Co. v. Montfiore*, L. R., 1 Exch. 109.

⁴ *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. Rep. 869, 48 Am. Rep. 775; *Hill v. Mathews*, 78 Mich. 377, 44 N. W. Rep. 286.

⁵ *Johnson v. Fessler*, 7 Watts, 48, 32 Am. Dec. 738.

An offer to sell goods through the mail must be accepted by a post (not necessarily the first) which leaves during business hours of the day after it is received.⁶ The use of the telegraph to make the offer implies a still shorter limitation of time, and hence it has been held that an offer made by wire on one day could not be accepted by letter nor by a telegram the next day.⁷

The rule is the same where the offer is for an act and not for a promise.⁸ A reward for the arrest of a criminal *ipso facto* expired after a reasonable time, although never actually withdrawn, and one who had arrested a criminal three years after its publication is not entitled to avail himself of the offer.

An offer may have expired by a reasonable time having elapsed, yet if the offeree, in good faith, makes known his acceptance within any period which he could have fairly believed to be reasonable, good faith, it is said, requires the offerer, if he intends to set up the delay, to make known that intention promptly; otherwise he may be regarded as having assented to the offer made *de novo*, in the late acceptance.¹⁰

§ 35. *By Death or Insanity.*

The death¹ or insanity² of either party before acceptance of the offer terminates it. The continuance of an offer is in the

⁶ *Maclay v. Harvey*, 90 Ill. 525, 32 Am. Rep. 38; *Bernard v. Torrance*, 5 Gill & J. 383; *Eagle Mill Co. v. Caven*, 76 Mo. App. 458; *Batterman v. Morford*, 76 N. Y. 622; *Ortman v. Weaver*, 11 Fed. 358; *Dunlop v. Higgins*, 1 H. L. Cas. 381, 12 Jur. 295.

⁷ *Quenerduaine v. Cole*, 32 Wkly. Rep. 185; *James v. Marion Fruit Jar & Bottle Co.*, 69 Mo. App. 207.

⁸ *Ramsgate Hotel Co. v. Montfiore*, L. R. Ex. 101; *Loring v. Boston*, 7 Metc. 407.

⁹ *Loring v. Boston*, *supra*. Ten years was held not too long (*Drummond v. U. S.* 35 Ct. Cl. 236), and twelve years too long (*Mitchell v. Abbott*, 25 Me. 338), to accept a published offer of a reward. In Connecticut it is held that an offer of a reward for a particular crime does not lapse until the statute of limitations bars the conviction. *Re Kelly*, 39 Conn. 159.

¹⁰ *Phillips v. Moore*, 71 Me. 78.

¹¹ 9 Cyc. 293, 13 C. J. 298; *Holfenstein's Estate*, 77 Pa. St. 328, 18

nature of a constant repetition of it, which necessarily requires some one capable of making a repetition.³ Hence an acceptance communicated to the representatives of the maker of an offer cannot bind him. And since an offer unaccepted creates no rights, it can transmit none to the representatives of the person to whom the offer is made, and they have no power to accept it on behalf of his estate.⁴ But in the case of contracts made through the mail where, as we have seen, the offerer, by using the post office, makes it his agent to receive the acceptance, the death of either party after the acceptance was mailed but before the letter could reach the offerer, would not affect the case, the contract being complete the moment the acceptance was mailed.⁵

§ 36. *By Change of Circumstances.*

An offer may lapse from a change of the circumstances under which it was made. The destruction of the subject-matter of the contract;¹ the dissolution of a partnership to whom or by whom it was made;² a change in the physical condition of one to whom an offer to insure his life has been made;³ the bankruptcy of one of the parties which transfers all his property to trustees,⁴ have been held to cause the offer to come to an end.

Am. Rep. 449; *Wallace v. Townsend*, 43 Ohio St. 537, 54 Am. Rep. 829; *Frith v. Lawrence*, 1 Paige 434; *Twenty-third Street Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. Rep. 177, 28 N. Y. St. 482; *Mactier v. Frith*, 6 Wend. 103; *Union Sawmill Co. v. Mitchell*, 122 La. 900, 48 South 317; *Jordan v. Dobbins*, 122 Mass. 168.

² *Beach v. First M. E. Church*, 96 Ill. 177.

³ *Pratt v. Trustees*, 93 Ill. 478.

⁴ *Sutherland v. Perkins*, 75 Ill. 338.

⁵ *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262.

¹ See *Post Consent*, § 204.

² *Goodspeed v. Wiard Plow Co.*, 45 Mich. 322, 7 N. W. 902.

³ *Equitable L. Assur. Co. v. McElroy*, 83 Fed. 631; *Canning v. Farquhar*, 16 Q. B. D. 727, 55 L. J. Q. B. 225.

⁴ *Meynell v. Surtees*, 1 Jur. N. S. 737, 25 L. J. Ch. 257.

§ 37. *Revocation of Acceptance.*

Acceptance by an overt act, as has been shown, concludes the contract.¹ It is to offer "what a lighted match is to a train of gunpowder. It produces something that cannot be recalled or undone."²

Should the offer be "Signify your acceptance by firing a gun or hoisting a flag or lighting a fire," we have seen that if the offeree has done the thing called for it does not affect it that the offerer had not heard the gun nor seen the flag or fire. Nor if the offer is by mail, does it matter that the letter of acceptance, before it has gone a mile on its journey, is destroyed by a mail car catching on fire or going through a bridge. So if the offerer should send his offer by his own servant, who be given a letter of acceptance, if the offeree should afterwards snatch it from his hand or steal it from him or induce him to return it to him there would still be an agreement.³ And to post a second letter a moment after the first is mailed, or to send a telegram to the offerer, informing him that the acceptance just mailed is revoked, although they were received before the first letter, would be of no avail.⁴

"It is not easy to see how the English courts could now decide otherwise. Nor is it easy to see that any hardship need arise from the law as it stands. The offeree need not accept at all; or he may send a qualified acceptance. 'I accept unless you get a revocation from me by telegram before this reaches you'; or he may telegraph a request for more time to consider. If he chooses to send an unconditional acceptance there is no reason why he should have an opportunity of changing his mind, which he would not have enjoyed if the contract had

¹ Ante § 30.

² Anson, Contr., § 42.

³ Langdell to the contrary notwithstanding. Contr., § 15.

⁴ Potter v. Sanders, 6 Hare 1; Com. Ins. Co. v. Hallock, 27 N. J. (L.) 645, 72 Am. Dec. 380; Malloy v. Drumheller, 68 Wash. 106, 122 Pac. 1005; Brauer v. Shaw, 168 Mass. 198; Aliter in Scotland; Dun-

been made *inter prasentes*.”⁵ “Imagine the following case. A., a deaf man said to B.: ‘Will you buy my watch for \$25?’ B. replied: ‘I will.’ A. did not hear and asked him to write out the answer. B. then wrote, ‘No, I will not.’ Or, suppose this case: Jones had a phonograph on his desk. Upon leaving his office he spoke into it an offer to sell his horse to Brown for \$500. Brown coming in soon after received the offer from the phonograph and spoke into it an acceptance. Upon leav-

more v. Alexander, 9 Shaw D. & B. 196, and by statute in South Dakota; Watters v. Lincoln, 29 S. D. 98, 135 N. W. 712. All of these decisions have been made on the former rule, both in the United States and in England, that one had no control over a letter after it was posted. But recently our post-office regulations have been changed to agree with the Continental ones (see *Ex parte Cote*, L. R. 9 Ch. 27), and the writer or sender may apply for a letter he has put in the mail and when properly identified the postmaster must return it to him or telegraph to the office of the addressee whose postmaster must return it to the mailing postmaster, if it has not been delivered. (U. S. Post-Office Regulations, sec. 487, 489.) Now can a change in the regulations of the post-office affect the law that the acceptance is final when the letter is dropped in the post-office? Suppose two days after the acceptor in Chicago has mailed his acceptance to the offerer who lives in San Francisco he finds out that he has made bad bargain, and requests the home postmaster to telegraph to the postmaster at San Francisco to return the letter to him and this is done. Except for the difficulty of proof of the acceptance has this act of his altered the case at all? Certainly not, unless you say that the change in the post-office regulations has changed the nature of the implied offer from “mail me your acceptance and I shall consider the bargain made” into “mail me your acceptance and I shall consider the bargain made unless you retake the letter before it gets to me.” This would be going too far. This change in post-office regulations seems founded on no good reason, but likely to afford dishonest men, seeking to avoid their contractual liabilities an easy way to do so should the Courts reverse their former rule as to acceptance by post because of them. One American Court, since they came into effect, has said (when an acceptance was mailed but was intercepted the next day by a telegram sent by the postmaster at the instance of the acceptor.) “The acceptor can no more overtake and countermand his letter mailed than he can his words of acceptance after they have escaped his lips. The bargain, if struck, must be *eo instanti* with such overt act. Mailing a letter containing an acceptance or the instrument itself if intended for the other party is certainly such overt act.” *Scottish American Co. v. Davis*, 73 S. W. 21 (Tex.). But see *Scottish Am. Mortgage Co. v. Davis*, 96 Tex. 504, 74 S. W. 17; *Flowers v. Sovereign Camp*, 40 Tex. Civ. App. 593, 90 S. W. 526; *Traders’ Nat. Bk. v. First Nat. Bk.*, 217 S. W. 977 (Tenn.). And a recent treatise on Contracts (Ashley § 21) says: “Suppose an offeree mails a suitable letter of accept-

ing the office he changed his mind, and meeting Jones on the street before the latter knew what had taken place said, 'I don't care to buy your horse, and I withdraw the acceptance which I spoke into your phonograph.' Or, suppose after Brown has spoken his acceptance into the machine he changes his mind and smashes the machine. There would seem to be a contract in all three cases, and this appears to be the legitimate conclusion to be drawn from most of the decisions."⁶

§ 38. *Time and Place.*

The contract arising from agreement dates from its acceptance and not from the time of the offer.¹ It is considered as made at the place where the acceptance is given.² And where there are numerous parties to a written agreement, at the place where the signature of the last necessary party is attached.³

ance. If then the offeree, now acceptor, recalls his letter from the post-office as he may do in the United States, he thus prevents his receipt by the original offerer, but as the contract has arisen he cannot by his act affect that result. By a reasonable interpretation of the original offer, there would seem to be not only a condition that the acceptance be mailed, but equally so that it be not interfered with by the acceptor. The same reasoning would apply in the above phonograph illustration where the acceptor smashes the machine. Thus, although the original offerer would be bound in contract he would not have to perform his part because of the non-happening of a condition precedent. Whether he could hold the acceptor without performing himself, depends entirely upon the character of the contract. In any case it could certainly be enforced by him according to its terms."

⁵ Anson, Contr., § 42.

⁶ Ashley, Contr., § 21.

¹ Leake Contr. 48; McDonald v. Fernauld, 68 N. H. 171, 38 N. E. Rep. 729.

² Leake Contr. 49; Dod v. Bonafée, 6 La. Ann. 563, 54 Am. Dec. 565; Cowan v. O'Connor, 20 Q. B. D. 640; Garretson v. Bank, 47 Fed. 867; Perry v. Mt. Hope Iron Co., 15 R. I. 380. A in X county telephones an offer to B, who is in Z county, and who accepts by telephone. The contract is made in Z county. Bank v. Sperry Co., 141 Cal. 314, 74 Pac. 855.

³ Mullers Margarine Co. v. Inland Revenue, 1 Q. B. 310 (1900).

CHAPTER II.

EXPRESS AND IMPLIED CONTRACTS.

SECTION 39. Contracts Express or Implied—Quasi or Mixed.

(A) IMPLIED CONTRACTS.

40. Acceptance of Goods or Services.
41. Agreement Implied from Request.
42. Without Request or Assent No Agreement.
43. Services Presumed to be for Hire.

(B) QUASI-CONTRACTS OR CONTRACTS CREATED BY LAW.

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49. Money Obtained by Wrongful Act.
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57. Benefits Received Under Agreement Partly Performed.
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60. Failure of Consideration.

(C) PROMISES IMPLIED FROM EXPRESS ONES.

61. Introductory.
62. Usages of Trade and Business.
63. Implied Promises in Contracts of Sale.
64. Implied Promises in Contracts of Agency and Service.

§ 39. *Contracts Express or Implied—Quasi or Mixed.*

According to the manner in which the agreement is formed, contracts are either *express* or *implied*.

An *express contract* is one where the intention of the parties and terms of the agreement are declared by the parties, in

writing or orally, at the time it is entered into.¹ An *implied* contract is one where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is presumed from their acts.²

The only difference between an express and an implied contract is in the mode of proof.³ Whether the contract be proved by evidence, direct or circumstantial, the legal consequences are the same.⁴ A promise will not be implied where there is an express contract covering the subject-matter.⁵ Yet where an express promise (not under seal) contains nothing more than the law will imply, the action may be brought on the implied promise.⁶

A *quasi* or constructive contract is where the law creates a promise regardless of the intention of the party.

Contracts may also be of a *mixed* character in respect of the mode of making them; *i. e.*, partly expressed in words, and partly implied from the acts of the parties and the circum-

¹ Hertzog v. Hertzog, 29 Pa. St. 465; Thompson v. Woodruff, 7 Coldw. 401; Wogahn v. Nat. Union Bk., 144 Wis. 646; 129 N. W. 1068; Jones v. Tucker, 84 Alt. 1012; Ind. Coal Co. v. Dalton, 43 Ind. App. 330; 87 N. E. 552.

² 9 Cyc. 242, 13 C. J. 7-9; Bixby v. Moore, 51 N. H. 402; Columbus, etc., R. Co. v. Gaffney, 65 Ohio St. 104, 61 N. E. 152; Wisconsin Steel Co. v. Maryland Steel Co., 203 Fed. 403, 121 C. C. I. 507; Turner v. Owen, 122 Ill. App. 501; Dowling v. Charleston R. Co., 105 S. C., 475; 81 S. E. 313.

³ Denman, C. J., in Church v. Imp. Gas Light Co., 6 Ad. & Ell. 846; Montgomery v. Montgomery Waterworks, 77 Ala. 248.

⁴ Marzetti v. Williams, 1 B. & Adol. 425; Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347; Seals v. Edmonson, 73 Ala. 295, 49 Am. Rep. 51. "Whenever circumstances arise in the ordinary business of life in which if two persons were ordinarily honest and careful the one of them would make a promise to the other it may properly be inferred that both of them understood that such a promise was given and accepted." Esher M. R., in Ex parte Ford, 16 Q. B. Div. 307.

⁵ 9 Cyc. 242, 13 C. T. 9, Prest v. Farmington, 104 Alt. 521; Loyal v. Wolf, 179 Ala. 505, 60 South 298.

⁶ Gibbs v. Bryant, 1 Pick. 118; Bank v. Patterson, 7 Cranch, 299.

stances and necessities of the case. What is implied in an express contract is as much a part of it as what is expressed. And every contract must be construed as if those terms which the law will imply were expressly introduced into it.⁷

(a)

IMPLIED CONTRACTS.

§ 40. *Acceptance of Goods or Services.*

Where one offers his goods or services under such circumstances that he obviously expects to be paid for them, the agreement arises when the labor or goods are accepted by the person to whom they are offered, and he by his acceptance becomes bound to pay a reasonable price for them.¹ "If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."² So if a person continues to receive a newspaper or periodical sent through the post office, he is liable for the subscription price.³ So if A sees B doing work for him under such circumstances that no reasonable man would suppose that B meant to do the work for nothing, A will be liable for its value.⁴

⁷ Jones v. Williams, 139 Mo. 1; Whincup v. Hughes, L. R. 6 C. P. 84, Hudson Canal Co. v. Penn. Co., 8 Wall. 276.

¹ Manhattan Co. v. Weber, 50 N. Y. (Supp.) 43; Hobbs v. Massasoit Whip Co., 158 Mass. 194; DeWolf v. Chicago, 26 Ill. 443; 294; Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560; Hart v. Hess, 41 Mo. 441; Dean v. Hodge, 35 Minn. 156, 59 Am. Rep. 235; Kiser v. Holladay, 29 Ore. 338, 45 Pac. 759; McMillan v. Page, 71 Wis. 655; McClary v. R. Co., 102 Mich. 312, 60 N. W. 695.

² Hoardley v. McLaine, 10 Bing. 482; Cincinnati Gas Co. v. Western Co., 152 U. S. 200; Wisconsin Steel Co. v. Maryland Steel Co., 203 Fed. 403, 121 C. C. A. 507.

³ Ward v. Powell, 3 Harr. (Del.) 379; Fogg v. Portsmouth Athenæum, 44 N. H. 115, 82 Am. Dec. 191; So one for whose benefit an advertisement is published where he has knowledge of it and makes no objection must pay for it. Stuckey v. Hardy, 15 Ind. (App.) 19, 41 N. E. Rep. 606.

⁴ Hertzog v. Hertzog, 29 Pa. St. 465; Curry v. Curry, 114 Pa. St. 367; Day v. Caton, 119 Mass. 513; Cicotte v. Church of St. Anne, 60 Mich. 552.

But it must appear that A knew that B was looking to him for the consideration. Thus if A employs C to build a house, and B does the work, and A has no reason to suppose B looks to him for pay, but may infer that he is acting for C, A is not liable to B, for he had no contract with B, had no reason to know that he was looking to him for pay, but had every reason to suppose that B was working under C.⁵

§ 41. *Agreement Implied from Request.*

A request by one to another to do something for him usually implies an agreement on his part to pay him what his services are reasonably worth.¹ But a mere request (whose terms do not imply any promise to pay)² is not sufficient to bind one, where the service is not for his benefit or there is no legal liability on him to have the labor performed,³ or where it was understood that the service was to be gratuitous.⁴

⁵ Woodruff v. R. Co., 108 N. Y. 39, 14 N. E. 832; Limer v. Traders Co., 44 W. Va. 175, 28 S. E. 730; see post, Agency

¹ Weeks v. Holmes, 38 Ill. 433; James v. Bixby, 11 Mass. 34; Lewis v. Trickey, 20 Barb. 387; Daugherty v. Whitehead, 31 Mo. 255.

² White v. Martin, 38 Ala. 174.

³ Smith v. Watson, 14 Vt. 332; Batchelder v. McKenney, 36 Me. 555; Norris v. Dodge, 23 Ind. 190; Boyd v. Sappington, 4 Watts 247. If one calls in a physician and requests him to perform services for another no implied promise to pay for them arises unless his relation to the patient is such, as to make a legal obligation on his part to provide a physician, as when a husband calls in a physician to attend a wife, or a father his minor child. Meisenbach v. Southern Cooperage Co., 45 Mo. (App.) 234; Williams v. Bushell, 37 Miss. 682, 75 Am. Dec. 88.

⁴ Kammerman v. Wigginton, 70 Mo. (App.) 486. "A person says to another: 'My horse is in such a stable, any time you would like to ride go and take him,' or 'I have such and such books in my library, any time you want them make use of them.' To say that such use by such permission raises an implied contract to pay what such use is worth is not sustained by law." Davis v. Breon, 1 Ariz. 240, 25 Pac. Rep. 537. A hotel keeper invites a female cousin to visit him which she does on several occasions, he not presenting any bill for her entertainment until some years later. Held, that the furnishing of the board and lodging raised no implied promise to pay for them. Danes v. Slitor, 91 N. W. Rep. 817 (Ia.).

§ 42. *Without Request or Assent no Agreement.*

A person cannot make another his debtor, for money advanced or services rendered, without the consent of the party benefited. There must be a previous request, express or implied, or an assent or sanction given after the money is paid or the act done.¹ Thus if one without another's knowledge pays his debt² or improves his house or land³ or other property, he cannot hold him liable to pay; nor does it change the case that he has benefited by the service which he has had no opportunity of accepting or rejecting.⁴ As remarked by Pollock, C. B.:

"Suppose I clean your property without your knowledge, have I then a claim on you for payment? One cleans another's shoes; what can the other do but put them on? Is that evidence of a contract to pay for the cleaning?"

And if in the furtherance of one's own affairs, a man confers a benefit upon another, he cannot recover compensation even though he expected it,¹ for the defendant's gain is not the plaintiff's loss, since his expenditure was made in protection of his own interests. If the benefit is conferred in reliance upon a contract with another, no compensation can be recovered,² for the defendant would not have accepted the benefit

¹ *Bartholomew v. Jackson*, 20 Johns. 28, 11 Am. Dec. 237; *Watkins v. Trustees of Richmond College*, 41 Mo. 302; *Holmes v. Bd. of Trade*, 81 Mo. 137; *Seals v. Edmondson*, 73 Ala. 295, 49 Am. Rep. 295; *Coleman v. U. S.*, 152 U. S. 96; *Hartnett v. Christopher*, 61 Mo. (App.) 64; *Boston v. Dist. of Columbia*, 19 Ct. of Cl. 31.

² *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Johnson v. Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38.

³ *Yeats v. Ballentine*, 56 Mo. 530; *Brennan v. Chapin*, 19 N. Y. (S.) 237; *Loring v. Bacon*, 4 Mass. 575.

⁴ *Taylor v. Laird*, 1 H. & N. 266, 25 L. J. (Ex.) 329; *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329.

⁵ *Taylor v. Laird*, 1 H. & N. 266, 25 L. J. (Ex.) 329.

¹ *Walker v. Stetson*, 162 Mass. 86, 38 N. E. 18; *Ulmer v. Farnsworth*, 80 Me. 500, 15 Atl. 65; *Loring v. Bacon*, 4 Mass. 575; *Peters v. Gallagher*, 37 Mich. 407; *Coleman v. U. S.*, 152 U. S. 96, 14 Sc. T. 473.

² *Morrison v. Jones*, 6 Ill. App. 89; *Dodge v. Lansing etc. Co.*, 152 Mich. 100, 115 N. W. 1004.

had he thought compensation was expected, and the plaintiff has got what he wanted—the credit of the person with whom he contracted. B, for example, orders C to deliver an automobile to A. C does this. B becomes insolvent. Or B hires C to paint A's house. C paints the house. B becomes insolvent. A sells the house and it is proved that he received \$1000 more than if the house had not been painted. That A cannot be compelled to pay is clear.³

Wherever the benefit is conferred on another in such a way as to cause the recipient to believe no compensation is expected, it would in general not be just to call upon him (especially in the case of money) for reimbursement, for his position has been altered, and but for the plaintiff's act he would have spent it in another way.⁴

§ 43. *Services Presumed to Be for Hire.*

Where services are rendered by one for another they are presumed to be for hire and not gratuitous.¹ But there is no presumption of this kind where the parties are members of the same family or near relatives,² but clear and satisfactory proof must be given of a contract to pay, or the circum-

³ *Concord Coal Co. v. Ferron*, 71 N. H. 33, 51 Alt. 283.

⁴ The author had a personal experience of this kind. On inquiring at the London office of a Travel agency, as to the fare from London to Brussels he was told that it was the same whether he went directly there or via Paris. He, therefore, chose the latter route, the tickets were sent to his hotel that night, for which he paid. But on returning from his trip, he was notified that a mistake had been made, that the Paris route was several pounds more. He refused to pay the additional amount, as he would not have chosen this expensive route but for the statement of the agent. He finally agreed to leave the question to the Company's lawyer who at once decided that the author's position was right.

¹ *Lawson Presumptive Ev.* 47; *Kiser v. Holladay*, 28 Ore. 338, 45 Pac. Rep. 959.

² *Lawson Presumptive Ev.*, 47; *Keegan v. Malone*, 62 Ia. 208; *Webster v. Wadsworth*, 14 Ind. 283; *Williams v. Hutchinson*, 3 N. Y. 312, 63 Am. Dec. 301; *Zimmerman v. Zimmerman*, 129 Pa. St. 229, 15 Am. St. Rep. 720; *People v. Porter*, 287 Ill. 401, 123 N. E. 59.

stances must be strong of an intention that compensation should be made.³

Where services are rendered and accepted without any expectation of compensation, a promise to pay for them cannot be implied.⁴ So where they are rendered in the expectation or hope of receiving in return a gift or bequest,⁵ or other benefits,⁶ no action will lie because the plaintiff's expectations have been disappointed, unless the other had actually agreed to pay for them in this way or the circumstances show that such was the intention of both parties.⁷

³ *Duffey v. Duffey*, 44 Pa. St. 397; 521; *Guild v. Guild*, 15 Pick. 129; *Plate v. Durst*, 42 W. Va. 63, 24 S. E. Rep. 580.

⁴ *Morris v. Barnes*, 35 Mo. 412; *Hertzog v. Hertzog*, 29 Pa. St. 465; *Zerrahn v. Ditson*, 117 Mass. 553.

⁵ *Kennard v. Whitson*, 1 Houst. 36; *Dawson v. Dawson*, 13 N. J. (Eq.) 246; *Martin v. Wright*, 13 Wend. 460, 28 Am. Dec. 468.

⁶ As for example in expectation of marriage. *Lefontain v. Hayhurst*, 89 Me. 388, 36 Atl. Rep. 623; *Clary v. Clary*, 93 Me. 220, 44 Atl. Rep. 921. In a New York case (*Bristol v. Equitable Life Assn.*, 132 N. Y. 264, N. E. Rep. 506) an inventor in order to induce a corporation to employ him revealed in confidence the secret of a valuable system of advertising which he had invented. He did not intend to ask any compensation. He was not employed but defendant used his ideas. The court held that there was no liability on the defendant to pay for the information, saying: "A wishes to sell his house and lot. B tells him in confidence that C desires to buy it, and B solicits employment to negotiate the sale. A declines, but, acting upon B's communication, meets C and himself negotiates and closes the contract of sale. B has no cause of action against A. *Simon v. Tipton*, 21 Ky. Law Rep. 167, 50 S. W. Rep. 1106. He had information which he hoped to market, but he parted with it without finding any market. The plaintiff himself communicated his system to the defendant to induce it to employ him, and thus used it as an attractive adjunct to his own self-commendation or in corroboration of it. He could not induce the defendant to adopt this system and the writer with it. Yet as the defendant acted upon the hint the plaintiff gave to it, and found it profitable to do so, the plaintiff asks the defendant to pay him a percentage of its profits. We do not think the complaint states a cause of action." But see *Thomas v. Thomasville Club*, 121 N. C. 238, 28 S. E. Rep. 293.

⁷ *Cann v. Cann*, 20 S. E. Rep. 916 (W. Va.); *Reynolds v. Robinson*, 64 N. Y. 583; *Frost v. Tarr*, 53 Ind. 394; *Taylor v. Wood*, 4 Lea, 504.

(b)

QUASI CONTRACTS OR CONTRACTS CREATED BY LAW.

§ 44. *General Principles.*

A *quasi* or constructive contract is where the law creates a promise regardless of the intention of the party. In an implied contract, the party's intention is ascertained from his acts; in a *quasi* contract his intention is disregarded—the promise is a mere fiction imposed in order to give a remedy to the other party.¹ There is in fact no agreement, no mutual understanding and therefore no promise.

“In the wide sense, that contracts are said to spring from the relations of men to each other and to the society of which they are members, they are mere fictions, invented mainly for the purpose of giving and regulating remedies. A man ought to pay for services which he accepts and hence the law implies a promise that he will pay for them. A man ought to support his helpless children and hence the law implies a promise that he will do so. So a man ought to pay a judgment rendered against him or a penalty which he has by his misconduct incurred, and hence the law implies a promise that he will pay. There is no more contract to pay the judgment than there is to pay the penalty. He has neither promised to pay the one or the other. The promise is a mere fiction and is implied merely for the purposes of the remedy.”²

In the early English law agreement arose from offer and acceptance, and where a breach of contract resulted in fixed damages, the remedy was the action of debt, which extended likewise to any case where statute, common law or custom laid a duty upon one man to pay an ascertained sum to another. The action of assumpsit was for the recovery of an unliqui-

¹ 13 C. J. 10; *Sceva v. True*, 53 N. H. 627; *Hertzog v. Hertzog*, 29 Pa. St. 465; *People v. Speir*, 77 N. Y. 144; *Wickham v. Weil*, 17 N. Y. (Supp.) 518; *Hickam v. Hickam*, 46 Mo. (App.) 496; *Weinsburg v. St. Louis Cordage Co.*, 135 Mo. App. 553, 116 S. W. 461; *Board v. Bloomington*, 253 Ill. 164, 97 N. E. 280; *Morse v. Kenney*, 87 Vt. 445, 89 Atl. 865; *Peo v. Dummer*, 274 Ill. 637, 113 N. E. 934.

² *O'Brien v. Young*, 95 N. Y. 428, H. & H. 90.

dated sum or such damages as a breach of a contract had occasioned to the promisee. In course of time, however, assumpsit came to take the place of debt.

“First it was decided in *Slade’s Case*³ that an action might be maintained in assumpsit though the contract was a bargain for goods to be sold resulting in a liquidated claim or debt. Then where the breach of a contract resulted in such a claim the plaintiff was enabled to declare in the form of a short statement of a debt based upon a request by the defendant for work to be done or goods to be supplied and a promise to pay for them. This was settled in the last twenty-five years of the seventeenth century. Thenceforth a man might state claims arising from contract variously in the same suit—as a special agreement which had been broken—and as a debt arising from agreement and hence importing a promise to pay it. Such a mode of pleading was called an *indebitatus count*, or count in *indebitatus assumpsit*; the remedy upon a special contract which resulted in a liquidated claim was now capable of being stated as a debt with the addition of a promise to pay it. In this form it was applied to the kinds of liability which though devoid of the element of agreement gave rise to the action of debt and thence in all cases where A was liable to make good to X a sum gained at X’s expense. Thus for the convenience of the remedy, certain liabilities have been made to figure as though they sprang from contract and have appropriated the form of agreement.”⁴

The distinction between debt and assumpsit was abolished by the English Common Law Procedure act and in the United States by our reformed procedure and Codes. But for historical reasons we have a form of obligation called *quasi contract*—for want, says Anson, of a better name—which is not the result of agreement at all, but which acquired as we have seen, for purposes of pleading, the form of agreement.

These promises may be grouped under three heads. (1) Those founded upon a record. (2) Those founded upon a public duty. (3) Those founded upon the doctrine that one

³ 4 Coke 92.

⁴ Anson, *Contr.*, § 475.

shall not be allowed to enrich himself unjustly at the expense of another.

§ 45. *Judgments.*

A judgment of a court of competent jurisdiction, ordering a sum of money to be paid by one party to another, is not only enforceable by the process of the court, but can be sued upon as creating a promise on the part of the person against whom it is entered. As it does not rest upon the agreement of the parties it is not a true contract though it is frequently mistakingly called a contract of record. But a judgment is not a "contract" within the meaning of the Federal Constitution.

"A judgment for damages, estimated in money, is sometimes called by text-writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and by a fiction of law a promise to pay is implied where such legal obligation exists. It is on this principle that an action *ex contractu* lies upon a judgment. But this fiction cannot convert a transaction wanting the consent of parties into one which necessarily implies it."¹

It is a *quasi* contractual and not a contractual obligation.²

§ 46. *Public or Statutory Duty.*

Whenever the law creates a duty, it creates also a promise by the person upon whom the duty is imposed to perform that duty.¹ A common carrier intrusted with goods impliedly promises to carry and deliver them safely,² and the same is

¹ *State of Louisiana v. New Orleans*, 109 U. S. 285.

² *Biddleston v. Whytel*, 3 Burr, 1545; *State v. New Orleans*, 109 U. S. 285; *O'Brien v. Young*, 95 N. Y. 428; *Mosby v. R. Co.*, 146 U. S. 162.

¹ *Steamship Co. v. Joliffe*, 2 Wall. 450; *State v. New Orleans*, 109 U. S. 285; *Inhabitants v. Com.*, 144 Mass. 64, 10 N. E. 516; *McCoun v. R. R. Co.*, 50 N. Y. 176.

² *Lawson Bail*, § 118.

true of an innkeeper;³ a person using a toll-gate promises to pay the statutory toll, even though there is a penalty for evading the toll;⁴ taxes may be collected by suit on an implied promise to pay the collector;⁵ towns under a statutory obligation to support their paupers are liable on an implied promise to re-imburse other towns and individuals who have furnished such relief.⁶ In *Steamship Company v. Joliffe*,⁷ a statute provided for the licensing of pilots and provided for the fees for their services. It likewise provided that when a vessel was spoken by a pilot and his services were declined the vessel should be liable for half the regular fees. Said Mr. Justice Field:

“If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi contract*. The absence of assent on the part of the master or owner of the vessel does not change the case.”

§ 47. *Unjust Enrichment.*

A promise is created by the law whenever equity and good conscience require one and the question is not what was the party's intention, but what in equity and good conscience he

³ Lawson Bail, § 76.

⁴ *Central Bridge v. Abbott*, 4 Cush. 473; *New Albany Plank Road v. Lewis*, 49 Ind. 161.

⁵ Metc. Contr. 6.

⁶ *Inhabitants v. Com.*, 114 Mass. 67, 10 N. E. 516.

⁷ 2 Wall. 450.

ought to do.¹ This is said by the leading writer on the subject to be the most important source of the quasi-contractual obligation;² and includes the obligation of an infant or lunatic or husband to pay for necessities; money obtained by trespass, fraud or duress; money paid under mistake; money paid under an illegal agreement; benefits received under a contract only partly performed; money paid for the use of another, and money paid under a consideration which has failed.

These classes of *quasi* contracts are considered in the remaining sections of this division.

§ 48. *Infants and Insane Persons—Husband and Wife.*

Neither an infant nor a lunatic can make a binding contract.¹ But if either obtains necessities from another person though the law will not hold him on his express promise to pay, yet the party supplying them may recover on a contract created by law to pay their reasonable value.²

So where a husband deserts his wife and forbids all persons to trust her on his account, saying that he will not be liable for her debts; nevertheless the law basing its action on the duty of the husband to support his wife creates a promise to pay for necessities supplied to her.³

§ 49. *Money Obtained by Wrongful Act.*

Where one has wrongfully or fraudulently possessed himself of money or of goods which he has turned into money, the rightful owner, though he has a remedy by an action of trespass or trover or for damages suffered by him through the

¹ Earle v. Coburn, 130 Mass. 596; Gorman v. Carroll, 7 Allen 199; Allen v. Burlington, 45 Vt. 202; Edwards v. Culbertson, 111 N. C. 342, 16 S. E. 233; Peo v. Dummer, 274 Ill. 637, 113 N. E. 934.

² Keener, Quasi-Contracts, 19.

³ See post, Chap. V.

² See post, §§ 138, 162.

³ See post, § 159; Cunningham v. Reardon, 98 Mass. 538.

fraud, may waive these and sue for the debt on the promise which the law implies.¹

§ 50. *Waiving Tort and Suing in Contract.*

This is a case where the tort may be waived and the guilty party sued on the promise which the law creates.¹ If a person assaults another or wrongfully imprisons him or slanders him, the action of tort is the only remedy, while if he steals his goods and sells them he may be sued in contract.² The reason is that in the former cases, there is no enrichment of the defendant, while in the latter there is; and unjust enrichment is the ground upon which this contractual action is based. As said by Lord Mansfield in an old case:³

“If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, etc., there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, beside the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance the executor shall not be chargeable for the injury done by his testator in cutting down another man’s trees, but for the benefit arising to his testator for the value or sale of the trees he shall.”⁴

Where the defendant has wrongfully taken the property

¹ Benton v. Driggs, 20 Wall. 125; Walter v. Coleman, 81 Ill. 380, 25 Am. Rep. 285; Johnson v. Ins. Co., 39 Mich. 33; Merriam v. Wolcott, 3 Allen 258, 80 Am. Dec. 69; Western Ins. Co. v. Towle, 65 Wis. 247.

² Hall v. Peckham, 8 R. I. 93; Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; Gilmore v. Wilbur, 12 Pick. 120, 22 Am. Dec. 410; Sleeper v. Davis, 64 N. H. 59, 10 Am. St. Rep. 377.

³ Downs v. Finnegan, 58 Minn. 112, 59 N. W. Rep. 982.

⁴ Hambly v. Trott, Cowp. 371.

⁵ A woman induced B to marry her by falsely representing that she was single. Held, that B could not sue her on a quasi contract but that the action must be one in tort. Re Payne, 65 Conn. 397, 32 Atl. Rep. 948. But in a converse case she may sue for the value of her services while she was living with him. Sanders v. Ragan, L. R. A. 1917, B. 681 and note L. 683.

but instead of converting it into money keeps it or has consumed it, it is held in a few states that the tort cannot be waived and the action brought on the contract created by law,⁵ while in the majority of jurisdictions this distinction is repudiated and the action in contract allowed where the property has not been converted into money.⁶ If the test of the liability of the defendant is unjust enrichment, it seems clear that the minority rule has no ground to support it. Goods and chattels are riches as well as silver and gold. Suppose A wrongfully takes from B four horses, and then gives one to his wife for love and affection, keeps one for his own use for pleasure riding, lets one to hire, and sells one for cash, upon what principle can it be said that there is no enrichment of himself at the owner's expense save in the one case of the cash received.

§ 51. *Voluntary Payment Not Recoverable.*

A voluntary payment made without compulsion or extortion, and with knowledge of all the circumstances, in discharge of a claim which was not due, or which might have been successfully resisted, is not recoverable.¹ This principle and the reasons therefore are clearly stated by Keener:²

⁵ Pike v. Bright, 29 Ala. 333; Fuller v. Duren, 36 Ala. 73, 76 Am. Dec. 318; Noyes v. Loring, 55 Me. 408; Glass Co. v. Wolcott, 2 Allen 228; Smith v. Smith, 43 N. H. 536; Stearns v. Dillingham, 22 Vt. 624, 54 Am. Dec. 88; Bethlehem v. Ins. Co., 81 Pa. St. 445; Tucker v. Jewett, 32 Conn. 563; Sanders v. Hamilton, 3 Dana 550; Schneizer v. Weiber, 6 Rich. (L.) 159.

⁶ Russel v. Bell, 10 M. & W. 346; Terry v. Munger, 121 N. Y. 161, 18 Am. St. Rep. 803; Fauson v. Linsley, 20 Kan. 325; Randolph Iron Co. v. Elliott, 34 N. J. L. 184; Force v. Squier, 133 Mo. 310; Fiquier v. Allison, 12 Mich. 328, 86 Am. Dec. 54; Logan v. Walter, 76 N. C. 416; Kirkman v. Phillips, 7 Heisk. 222; Goodwin v. Guff, 88 N. Y. 629; McDonald v. Peacemaker, 5 W. Va. 439; Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 702; Braithwaite v. Aiken, 3 N. D. 365, 56 N. W. 133; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981.

¹ Elliot v. Swartwout, 10 Pet. 137; Hall v. Schulz, 4 Johns. 240, 4 Am. Dec. 270; Gould v. McFall, 118 Pa. St. 455, 4 Am. St. Rep. 606; Brumagin v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Beard v. Beard, 25 W. Va. 486, 52 Am. Rep. 219.

² Quasi Contr., p. 26.

“Money paid with knowledge that the payee is not entitled thereto cannot be recovered, the law not permitting one who knows, or believes, that a claim is not well founded, to make the voluntary payment thereof a reason for appearing in court as plaintiff. Since the payment was unnecessary, the plaintiff must be regarded either as having intended to make a gift of that sum of money to the defendant—in which event there is no reason why he should be allowed to recover—or else as attempting to shift his position from that of a defendant to that of plaintiff—a course which would be in most cases unfair to the claimant, and which is not allowed in any case where the law deems the payment a voluntary one.”

So where a person pays a tax or assessment voluntarily, not to save his goods from being sold, there being no seizure or proceeding to compel the payment—he can not recover it back on the ground that the tax or assessment was illegal.³ So payment of a license fee to engage in a particular business is voluntary, and cannot be recovered, though illegal, where the effect of not paying would be a prosecution, either criminal or civil, in which the party could contest its legality.⁴

§ 52. *Money Paid Under Compulsion or Duress.*

Money paid to avoid arrest or to be released therefrom,¹ or through threats of personal injury,² or money paid to obtain

³ *Union Pac. R. R. Co. v. Commissioners*, 98 U. S. 541; *Ligonier v. Ackerman*, 46 Ind. 552, 15 Am. Rep. 323; *Christy v. St. Louis*, 20 Mo. 143, 61 Am. Dec. 599; *Claffin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54; *Couch v. Kansas City*, 127 Mo. 436, 30 S. W. 117; *City of Helena v. Dwyer*, 65 Ark. 155, 45 S. W. 349.

⁴ *Claffin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54; *Robinson v. Charleston*, 2 Rich. 317, 45 Am. Dec. 739; *Benson v. Monroe*, 7 Cush. 125, 54 Am. Dec. 716; *Noyes v. State*, 46 Wis. 250, 32 Am. Rep. 710.

¹ *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *DeMesnel v. Dakin*, L. R. 3 Q. B. 18. The imprisonment must be unlawful, *Eddy v. Henin*, Id.

² *Richardson v. Duncan*, 3 N. H. 508; *Harvey v. Boyd*, 42 Ill. 336.

possession of goods³ wrongfully taken or detained,⁴ or to protect property from threatened injury, may be recovered back.⁵ Where one pays money to free his goods from an attachment levied on them by one who has no cause of action,⁶ or where a common carrier or bailee of property refuses to carry or deliver property, except on payment of an excessive or illegal charge,⁷ or where a sheriff levies on his goods as the property of another,⁸ or where a man pays money to prevent a threatened illegal sale of his property under legal process,⁹

³ It is generally held that the rule is different as to money paid to prevent the sale or seizure of real property. In *Stover v. Mitchell*, 45 Ill. 213, it is said: "It has been sometimes held that a seizure of goods amounts to duress, because the owner may have such a pressing necessity for their immediate use that his legal remedies would not sufficiently protect him. . . . But we can discover no duress or compulsion where an execution against A is levied on the land of B. The latter is not disturbed in his person, or the possession or enjoyment of his title, he need give himself no trouble. If the superiority of his title to the lien of the judgment is questionable, or depends on matters in pais, resting in parol proof, and he fears a sale may create a cloud upon his title, he can stay the sale by injunction. If, instead of this, he prefers to buy his peace, he cannot subsequently say he acted under compulsion, or call on the courts to give him back his money." But see *Joannin v. Ogilvie*, 49 Minn. 564.

⁴ *Hills v. Street*, 5 Bing. 37; *Scholey v. Munford*, 60 N. Y. 501; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Peyser v. Mayor*, N. Y. 501, 26 Am. Rep. 624; *Lonergan v. Buford*, 148 U. S. 581, 13 Sc. T. 684.

⁵ *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178; *Mann v. Lewis*, 3 W. Va. 215, 100 Am. Dec. 747.

⁶ *Duke de Cardioval v. Collins*, 4 Ad. & Ell. 858; *Chandler v. Sanger*, 114 Mass. 364, 19 Am. Rep. 367.

⁷ *Parker v. R. Co.*, 7 M. & G. 253; *Ashmole v. Wainwright*, 2 Q. B. 837; *Chase v. Dwinal*, 7 Me. 134, 20 Am. Dec. 352; *Kenneth v. R. R. Co.*, 15 Rich. 284, 98 Am. Dec. 382; *Peters v. R. Co.*, 42 Ohio St. 275, 51 Am. Rep. 815.

⁸ *Adam v. Town of Litchfield*, 10 Conn. 127; *Preston v. Boston*, 12 Pick. 7; *Valpy v. Manning*, 1 C. B. 593; *Snowdon v. Davis*, 1 Taunt. 359; *Brown v. Worthington*, 162 Mo. App. 508, 142 S. W. 1082.

⁹ *Elliott v. Swartwout*, 10 Pet. 139; *Preston v. City of Boston*, 12 Pick. 7; *Erskine v. Van Arsdale*, 15 Wall. 75; *Peyser v. Mayor*, 70 N. Y. 497, 26 Am. Rep. 624; *First Nat. Bank v. Blakely*, 40 Mich. 367; *Greenbaum v. King*, 4 Kan. 284, 96 Am. Dec. 172; *Tuttle v. Everett*, 51 Miss. 27, 24 Am. Rep. 622; *Neuman v. LaCrosse*, 94 Wis. 103, 68 N. W. 654; *Rumford Chemical Works v. Ray*, 19 R. I. 456, 34 Atl. 814.

the money may be recovered back as for a debt due him. The ground for this right is that one who is entitled to possession of his property need not wait on the delays of the law to obtain the same, but may comply in form with the terms of the party who is depriving him of that right.¹⁰

But it is essential that there be some actual or threatened exercise of power possessed or supposed to be possessed, by the party exacting or receiving the payment¹¹ over the person or property of the party making the payment,¹² from which the latter has no other means¹³ of immediate relief¹⁴ than by advancing the money.¹⁵

So where a public officer exacts fees to which he is not entitled before he will perform his legal duty,¹⁶ or one pays money to avoid an injury to his business.¹⁷

¹⁰ Keener, *Quasi Contr.*, 427.

¹¹ *Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Taylor v. Board of Health*, 31 Pa. St. 73, 72 Am. Dec. 724.

¹² *Robertson v. Marsh*, 42 Tex. 149; *Robinson v. Gould*, 11 Cush. 57; aliter when the party is a near relative; see post, *Duress*, § 258.

¹³ Therefore the commencement of legal proceedings, without any seizure of property or person, is insufficient; for the party has an ample remedy in his right to set up his defense in the court. *Benson v. Monroe*, 7 Cush. 125, 54 Am. Dec. 716; *Dickerman v. Lord*, 21 Iowa 338, 89 Am. Dec. 570;; *Cummins v. White*, 4 Blackf. 356. So money wrongfully demanded as rent and paid under threats of ejectment is not recoverable. *Emmons v. Scudder*, 115 Mass. 367.

¹⁴ *Cook v. Boston*, 9 Allen 393; *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Taylor v. Board of Health*, 31 Pa. St. 73, 72 Am. Dec. 724; *Claffin v. McDonough*, 33 Mo. 412; *Cunningham v. Boston*, 15 Gray 468.

¹⁵ *Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Radick v. Hutchins*, 95 U. S. 210; *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Wolfe v. Marshall*, 52 Mo. 167.

¹⁶ *Dew v. Parsons*, 2 B. & Ald. 562; *Steele v. Williams*, 8 Ex. 625; *Clinton v. Strong*, 9 Johns 370; *Niedermeyer v. Curators*, 61 Mo. (App.) 654.

¹⁷ *Carew v. Rutherford*, 10 Mass. 1. As where an excessive water license fee is paid under threat of cutting the water off. *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4; *St. Louis Brewing Co. v. St. Louis*, 37 S. W. Rep. 525. Where one paid an excessive fee in order to obtain revenue stamps necessary in his business. *Swift Co. v. U. S.*, 111 U. S. 22. Where one paid excessive duties to obtain goods imported by him. *Robertson v. Frank Bros. Co.*, 132

Money paid under compulsion of legal process cannot be recovered back, though the money may not have been justly due, or the process may have been irregularly or wrongfully issued. The judgment of the court is conclusive and cannot be questioned in a new action.¹⁸ But a recovery may be had where the judgment is afterwards reversed¹⁹ or the seizure is not authorized by the process²⁰ or the court rendering the judgment had no jurisdiction to do so.²¹

§ 53. *Effect of Protest.*

The absence of a protest is not decisive against the right to recover the money paid. But a protest is evidence of the plaintiff's intention at the time of the payment,¹ and where it is doubtful whether the payment was involuntary or the result of a compromise, the absence of a protest would be almost conclusive evidence in favor of the latter view.² On the other hand a voluntary payment does not become an involuntary one merely because it is made under protest.³

U. S. 17. In *Dana v. Kemble*, 17 Pick. 245, an actor, after everything was ready for the performance, refused to perform until a certain sum of money, to which he was not entitled, was paid him. It was held that the payment was involuntary, and recoverable by the manager.

¹⁸ *Marriott v. Hampton*, 7 Term Rep. 269; *Gray v. Roberts*, 2 A. K. Marsh, 208, 12 Am. Dec. 383; *Kirklan v. Brown*, 3 Humph, 174, 40 Am. Dec. 635; *Stevens v. Howe*, 127 Mass. 164; *Turner v. Barber*, 49 Atl. Rep. 676 (N. J.).

¹⁹ *Clark v. Pinney*, 6 Cow. 297; *Mayor v. Riker*, 38 N. J. (L.) 225, 20 Am. Rep. 386; *Traveler's Ins. Co. v. Heath*, 95 Pa. St. 333.

²⁰ *Logan v. Sumter*, 28 Ga. 242, 73 Am. Dec. 755.

²¹ *Moses v. Macfarland*, 2 Burr. 1005.

¹ *Lamborn v. Co. Comm'rs*, 97 U. S. 181; *Detroit v. Martin*, 34 Mich. 170, 22 Am. Rep. 512; *Flower v. Lance*, 59 N. Y. 603; *De La Costa v. Ins. Co.*, 136 Pa. St. 62.

² *Monongahela Nav. Co. v. Wood*, 194 Pa. St. 47, 45 Atl. Rep. 73.

³ *Regan v. Baldwin*, 126 Mass. 485, 30 Am. Rep. 689; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Benson v. Monroe*, 7 Cush. 125, 54 Am. Dec. 716.

“When a party pays under duress of his goods, a protest may become important as evidence that the payment was the effect of the duress, and not an admission of the right enforced by the adverse party. But where there is no legal compulsion, a party yielding to the assertion of an adverse clam cannot detract from the force of his concession by saying ‘I object,’ or ‘I protest,’ at the same time that he actually pays the claim. The payment nullifies the protest as effectually as it obviates the previous denial and contestation of the claim.”⁴

§ 54. *Payment Under Mistake of Fact.*

Money paid under a mistake of fact may be recovered back, where the mistake is such as to have produced a supposed liability to pay the money, which in reality did not exist.¹ A mistake of fact occurs where some fact which really exists is unknown to the party, or some fact is believed by him to exist which really does not.² It is not paid by mistake where made in discharge of clearly ascertained legal rights and duties,³ or where it is paid in the reasonable belief that it is due, and after investigation, or the opportunity therefor,⁴ or where the

¹ Fleetwood v. New York, 2 Sandf. 475. Where a statute requires a protest, no recovery can be had without one. U. S. v. Clement, Crabbe 447; and if a written protest is required an oral one is of no effect. Knowles v. Boston, 129 Mass. 551. And it has been ruled in some cases that an illegal tax can in no case be recovered if its payment was unaccompanied by a protest. Allentown v. Saeger, 20 Pa. St. 421; Jackson v. Atlanta, 61 Ga. 228. And a protest made after payment is unavailing. Marriott v. Brune, 9 How. 619.

² Wheadon v. Olds, 20 Wend. 174; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516; Lyle v. Shinnebarger, 17 Mo. App. 66; Garland v. Salem Bank, 9 Mass. 408, 6 Am Dec. 86; Waite v. Leggett, 8 Cow. 195, 18 Am. Dec. 441; Moran v. St. L. Car Co., 210 Mo. 715, 109 S. W. 47.

³ Mowatt v. Wright, 1 Wend. 355, 19 Am. Dec. 509; Freeman v. Croom, 172 N. C. 524, 90 S. E. 523.

⁴ Hagerstown Bank v. Adams Ex. Co., 45 Pa. St. 419, 84 Am. Dec. 499.

⁴ Wheeler v. Hathaway, 58 Mich. 77.

party knows that it is not due but lacks the means of proving it.⁵ And the mistake must be of a material fact.⁶

In accordance with the general principle on which promises of this kind are created, there can be no recovery if it appears that it is not against equity and good conscience for the defendant to retain the money.⁷ Thus if a man pays a debt in ignorance of the fact that the statute of limitations has run against it, he cannot recover it on the ground of mistake.⁸

§ 55. *Payment Under Mistake of Law.*

Where money is paid voluntarily with knowledge of all the facts, the party cannot recover it back on the ground that he made a mistake as to his legal liability, or was ignorant of the law of the case.¹ But where one who knows the law takes advantage of one who is ignorant of it and the parties are not on an equal footing, the payment may be recovered on the ground of fraud. This is well illustrated in the case of a public officer:

“He and the public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services. But with them it is different. They have neither

⁵ *Windbril v. Carroll*, 16 Hun. 101; *Nat. Life Ins. Co. v. Jones*, 59 N. Y. 149, 1 T. & C. 466; *Franbers v. Rich*, 2 Ill. (App.) 427.

⁶ *Langevin v. St. Paul*, 49 Minn. 189, 51 N. W. Rep. 817; *Needles v. Burk*, 81 Mo. 569.

⁷ *Munt v. Stokes*, 4 T. R. 511; *Brisbane v. Dacres*, 5 Taunt. 144; *Kingston Bk. v. Eltinge*, 66 N. Y. 625. As to right to recover money paid by mistake where the position of the payee has been altered, see note to *Grand Lodge v. Towne*, 161 N. W. 403 (Minn.), in L. R. A. 1907, E. 349.

⁸ *Farmer v. Arundel*, 2 W. Bl. 824.

¹ *Bilbie v. Lunsley*, 2 East. 469; *Beard v. Beard*, 25 W. Va. 486, 52 Am. Rep. 219; *Rector v. Collins*, 46 Ark. 167, 55 Am. Rep. 571; *Churchill v. Bradley*, 58 Vt. 403, 56 Am. Rep. 563; *Lester v. Mayor of Baltimore*, 29 Md. 415, 96 Am. Dec. 542; *Bucknall v. Story*, 46 Cal. 589, 13 Am. Rep. 220; *Champlin v. Laytin*, 18 Wend. 407, 31 Am. Dec. 382. See 160 N. Y. 533, 55 N. E. 210.

the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not, and as a general rule, relying on his honesty and integrity, they acquiesce in his demands.”²

A mistake, however, of a *foreign* law is regarded as a mistake of fact and not of law.³

§ 56. *Money Paid Under Illegal Agreement.*

A court will not enforce an illegal agreement,¹ nor can money paid or goods delivered or lands conveyed under an illegal agreement whether as the consideration or in performance of such an agreement be recovered back.²

But to this rule there are three exceptions: (a) Where the parties are not equally guilty; (b) where the party complaining is protected by the law; (c) where the illegal agreement has not been executed.

(a) Though the object be illegal yet if the parties did not stand on an equal footing, and one of them has been induced to enter into the illegal agreement through fraud, oppression or undue influence, he may appeal to the court for relief. He is *in delicto* but not *in pari delicto*. His guilt is less than that of his associate and the latter cannot make use of his peculiar power over the other under such circumstances to procure an illegal agreement, and then invoke the aid of the law to enable him to retain that which he has thus wrongfully obtained.³ In *Atkinson v. Denby*,⁴ plaintiff, a debtor, offered

² *Steamship Co. v. Young*, 89 Pa. St. 186; *Marcotte v. Allen*, 91 Me. 74, 39 Atl. 346.

³ *Haven v. Foster*, 9 Pick. 112.

¹ See post, § 216.

² *Newstead v. Hall*, 58 Ill. 172; *Meyers v. Weinrett*, 101 Mass. 336; *St. Louis, etc., R. Co. v. Mathers*, 71 Ill. 592, 104 Ill. 257; *Wayman v. Fiske*, 3 Allen 238, 80 Am. Dec. 66; *Loomess v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153; *Atwood v. Fish*, 101 Mass. 363, 100 Am. Dec. 124; *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48; *Harriman v. Northern Securities Co.*, 197 U. S. 244, 25 Sc. T. 493.

³ *Reynell v. Sprye*, De G. M. & G. 660; *Tracy v. Tallmage*, 14 N. Y. 285; *Baehr v. Wolf*, 59 Ill. 470; *Belding v. Smythe*, 138 Mass. 530; *White v. Franklin Bk.*, 22 Pick. 181; *Brooks v. Martin*, 2 Wall. 81; *Duval v. Wellman*, 124 N. Y. 156.

⁴ 6 H. & N. 778.

his creditors a composition of 5s. in the pound. Defendant was a creditor, and his acceptance or rejection was known to be certain to determine the decision of several others. He refused to assent unless plaintiff would make him an additional payment of £50. This was done; the composition arrangement was carried out, and plaintiff sued to recover the £50, on the ground that it was a payment made by him under oppression and in fraud of his creditors. It was held that he could recover.

“It is said that both parties are *in pari delicto*. It is true that both are *in delicto*, because the act is a fraud upon the other creditors; but it is not *par delictum*, because the *one has power to dictate, the other no alternative but to submit.*”

Where the illegality depends upon the existence of facts known to one but not to the other, the parties are not *in pari delicto*.⁵

“The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party.”⁶

(b) When the agreement is not *malum in se* but is *malum prohibitum* merely, and the prohibition is intended for the protection of the party complaining, he will be entitled to relief.⁷ By the statutes of usury taking more than a certain interest is declared illegal; but as these statutes are to protect needy persons from the oppression of usurers, the party injured though he has made an illegal payment may recover the excess of interest.⁸ So of money paid for lottery tickets,

⁵ Bloxsome v. Williams, 3 B. & C. 232; Louisiana v. Wood, 102 U. S. 294.

⁶ Taylor v. Chester L. R. 4 Q. B. 314.

⁷ Peoples Bk. v. Dalton, 2 Okla. 476, 37 Pac. 808; Scotten v. State, 51 Ind. 52; Tootle v. Berkley, 57 Kan. 111, 45 Pac. 77; Atlas Bank v. Nahant Bank, 3 Metc. 581; Parkersburg v. Brown, 106 U. S. 487.

⁸ Browning v. Morris, 2 Cowp. 792; Taylor v. Heintz, 30 Atl. Rep. (N. J.).

for laws against lotteries are to punish and restrain lottery keepers, and to protect their credulous and often needy patrons.⁹ A party, who had deposited money in a bank repayable at a future day, in violation of a statute, was allowed to recover back the deposit, for otherwise it would have given effect to an illegal contract in favor of the principal offender, and would have operated as a reward for an offense which the statute was intended to prevent.¹⁰ Where a statute expressly authorizes one of the parties to an illegal agreement to sue, the right is of course clear; as in the case of statutes permitting the recovery of money lost at gambling.¹¹

(c) Where the illegality is *malum prohibitum* only, a person who has paid money or delivered goods for a purpose which is illegal may repudiate the transaction at any time before that purpose is executed and recover them back.¹² The reason is that "it best comports with public policy to arrest the illegal proceeding before it is consummated."¹³

In *Spring Company v. Knowlton*,¹⁴ the officers of a corpora-

⁹ *Gray v. Roberts*, 2 A. K. Marsh, 208, 12 Am. Dec. 383; *Mount v. Waite*, 7 Johns. 434; *Barclay v. Pearson* (1893), 2 Ch. 154, L. J. Ch. 636.

¹⁰ *White v. Franklin Bank*, 22 Pick. 181; *Atlas Bank v. Nahant Bank*, 3 Metc. 581; *Tracy v. Talmage*, 14 N. Y. 162; *Parkersburg v. Brown*, 106 U. S. 487.

¹¹ *Tatman v. Strader*, 23 Ill. 473; *Richardson v. Kelly*, 85 Ill. 491; *Story v. Brennan*, 15 N. Y. 524, 69 Am. Rep. 623; *Mitchell v. Orr*, 107 Tenn. 534, 64 S. W. Rep. 476; And see *Connor v. Black*, 119 Mo. 126, 24 S. W. 184.

¹² *Spring Co. v. Knowlton*, 103 U. S. 49; *Knowlton v. Congress, etc., Co.*, 57 N. Y. 518; *White v. Franklin Bank*, 22 Pick. 181; *Adams Ex. Co. v. Reno*, 48 Mo. 264; *Tyler v. Carlisle*, 76 Me. 210, 1 Am. St. Rep. 301; *Lewis v. Burton*, 74 Ala. 317, 49 Am. Rep. 816; *Clarke v. Brown*, 77 Ga. 606, 4 Am. St. Rep. 98.

¹³ *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755. According to some of the decisions the action to recover the money paid will lie until the agreement has been completely performed. *Stansfield v. Kunz*, 62 Kan. 797, 64 Pac. 614; *Krewert v. Rindskopf*, 46 Wis. 481, 1 N. W. 163; *Congress Spring Co. v. Knowlton*, 103 U. S. 49. Other cases hold that it is too late after the agreement has been partly performed. *Kearley v. Thompson*, 24 Q. B. D. 742; *Re Great Berlin Steamship Co.*, 26 Ch. Div. 616; *Ullman v. St. Louis Fair Ass'n*, 167 Mo. 273, 66 S. W. 949.

¹⁴ 103 U. S. 49.

tion determined, in violation of a statute, to increase their capital stock, every old stockholder to have a full paid \$100 share for \$80, if he agreed that if the full amount of the new stock subscribed by him was not paid when called for, the amount that he had paid should be forfeited. K, an old stockholder, signed this agreement and took new stock, but after paying 20 per cent of it he was unable to pay the balance and his stock was forfeited. Subsequently the corporation abandoned the scheme and refunded the money which had been paid for the new stock in cases where it had not been forfeited. K thereupon sued for the money which he had paid and which had been forfeited under the agreement, and it was held that he could recover.

“There was no performance of the contract whatever by the company, and only a part performance by Knowlton. It is to be observed that the making of the illegal contract was *malum prohibitum*, and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud. The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in performance can be recovered, the other party not having performed the contract or any part of it, and both parties having abandoned the illegal agreement before it was consummated. We think the authorities sustain the affirmative of this proposition.”

A common illustration of this rule is where money is deposited with a stakeholder on a bet or game. The depositor, although the whole transaction is illegal, may recover the money from the stakeholder if he demands it at any time before it is paid over to the winner.¹⁵

Where the agreement is innocently made and upon discov-

¹⁵ Benj., Princ. of Contr. 100; Hampden v. Walsh, 1 Q. B. Div. 189; Reynolds v. McKinney, 4 Kan. 94, 89 Am. Dec. 602; Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 787. But where the stakeholder pays over the money to the winner without any previous notice or demand by the loser, he is not liable, for the illegal agreement has thus become executed. Perkins v. Eaton, 5 N. H. 152; McCullam v. Gourley, 8 Johns. 147; Gregory v. King, 58 Ill. 169, 11 Am. Rep. 56; Bates v. Lancaster, 10 Humph. 134, 51 Am. Dec. 696. If the

ery of its illegality, the parties mutually agree to rescind, money paid prior to such rescission may be recovered back.¹⁶

§ 57. *Benefits Received Under Agreement Partly Performed.*

Where a person promises to do a certain thing and his compensation is either expressly or impliedly dependent upon the thing being entirely performed by him, a partial performance will be of no avail and he can recover nothing upon the contract.¹ This is the English law.² In *Cutter v. Powell*³ defendant had a ship which was about to sail from Jamaica to England and wanted a second mate. In answer to an advertisement Cutter applied and defendant gave this note: "Ten days after the ship Governor Parry, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter, the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool." The ship arrived at Liverpool on October 11th. Cutter did his duty as second mate until the 20th of September, when he died. It was held that his rep-

notice is given before the money is paid over, it is immaterial whether at the time of the notice the event upon which the money was staked has or has not happened. *Wheeler v. Spencer*, 15 Conn. 27; *Hale v. Sherwood*, 40 Conn. 332, 16 Am. Rep. 37; *Hampden v. Walsh*, L. R. 1 Q. B. D. 192; *Gilmore v. Woodcock*, 69 Me. 118, 31 Am. Rep. 255. But in a few cases it has been ruled that no recovery can be had where the stakeholder is not notified before the happening of the event, though the money has not yet been paid to the winner. *Yates v. Foote*, 12 Johns. 1; *Johnston v. Russell*, 37 Cal. 670; *Hill v. Kidd*, 43 Cal. 615. This is the law in Missouri by statute. R. S. 1889. § 5216. And if the other party has the money in his hands, the party rescinding the bet before the event happens may recover it from him. *Hickerson v. Benson*, 8 Mo. 8, 40 Am. Dec. 115; *Harper v. Cram*, 36 Ohio St. 338, 38 Am. Rep. 589; *McKee v. Maurice*, 11 Cush. 357. A principal who places money in his agents' hands to be used for gambling may repudiate the transaction before the money is so used and recover it from the agent. *Kearney v. Webb*, 278 Ill. 17, 115 N. E. 844.

¹⁶ *Skinner v. Henderson*, 10 Mo. 205.

¹ *Hartupee v. Crawford*, 56 Fed. Rep. 61.

² *Appleby v. Myers*, L. R. 2 C. P. 651.

³ 6 T. R. 320; 2 Smith Lead. Gas. 18.

representatives could not recover upon the express contract, for its terms were unfulfilled; nor could they recover upon a *quantum meruit* for such services as he had rendered, because the terms of the express contract excluded the arising of any such implied contract as would form the basis of a claim upon a *quantum meruit*.

“It may fairly be considered that the parties themselves understood that if the whole duty were performed the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage.”

But in the United States where a contract is not fully completed because of sickness or death or from some cause over which the party had no control, there may be a recovery in *quasi* contract for the benefits conferred on the defendant by the part performance.⁴ And it has been likewise held that where:

“The articles delivered were a part only of those agreed to be furnished under a special contract which was entire in its nature, providing one gross sum for the whole, yet the delivery of a part of the contracted articles only, and the defendant’s acceptance and appropriation of these, had conferred a benefit upon him, and created a corresponding duty or implied contract, separate from, and independent of the special contract, to pay what such delivered portion was reasonably worth; leaving to the defendant the right to recoup in this action, or to recover in another such damages as he might be able to show he had sustained by the plaintiff’s failure to perform the special contract.”⁵

Under an entire contract for the building of a house, if the house is destroyed before its completion, the builder can recover nothing.⁶ Here it is clear that there can be no recovery

⁴ Green v. Gilbert, 21 Wis. 395; Ryan v. Dayton, 25 Conn. 188, 65 Am. Dec. 560; Wolfe v. Howes, 20 N. Y. 197, 75 Am. Dec. 384. But there can be no recovery where the sickness could have been foreseen. Jennings v. Lyon, 39 Wis. 553. So the act of the law (Jones v. Judd, 4 Comst. 412) and war (Manhattan Life Ins. Co. v. Buck, 93 U. S. 24) have been held a good excuse.

⁵ Wilson v. Wagor, 26 Mich. 464; Richards v. Shaw, 67 Ill. 222.

⁶ Brecknock Co. v. Pritchard, 6 D. & E. 750; Partridge v. For-

on the contract, for it has not been performed; nor on a *quasi* contract, for the defendant has received no benefit from the partial performance.⁷ Where, however, one has agreed for a certain sum to do work and labor on a building and after partly completing his contract, the building is destroyed, it seems that he may recover the value of his services up to that time, not because what he has furnished has been of any benefit to the owner but because the owner is considered to have impliedly agreed that the building shall be in existence so that he could complete the work, which promise has not been fulfilled.⁸ In *Haynes v. Baptist Church*,⁹ A agreed to make and put in place certain church fixtures. He was to be paid on the completion and acceptance of the work. Before that the church burned down, and it was held that A could recover for as much work as he had done up to the time of the fire.

“The implied contract on the part of the defendant was to have and keep the building ready to receive these fixtures and to furnish room therein for them for such length of time as would reasonably be required to put them in place. The agreement to do all this is as much a part of the contract, as if expressed therein in terms. This the defendant failed to do. Besides this the house was in the possession, control, care and custody of defendant, and the plaintiff had nothing to do with its protection, further than to be without fault as to its own work. The contract was not, therefore, an absolute one to do the work at all hazards, but it was dependent upon the as-
syth, 29 Ala. 200; *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349; *School Trustees v. Bennett*, 27 N. J. (L.) 373; *Voght v. Hecker*, 95 N. W. Rep. 90 (Wis.).

⁷ If the property has been insured by the defendant and he had collected the insurance then the plaintiff could recover to the extent that the defendant had profited by his work. *Cook v. McCabe*, 53 Wis. 250, 10 N. W. Rep. 507.

⁸ *Niblo v. Binsse*, 3 Abb. App. Dec. 375; *Wheelan v. Ansonia Clock Co.*, 97 N. Y. 293. In *Lord v. Wheeler*, 1 Gray 282, where the house was destroyed before the repairs contracted for were completed, but the defendant had entered into its use and occupation and enjoyed the labor and material of the plaintiff, the latter was permitted to recover the value thereof. And see *Young v. City of Chicopee*, 72 N. E. 63 (Mass.), *The Tornado*, 108 U. S. 342, 2 Sc. T. 746.

⁹ 88 Mo. 285, 57 Am. Rep. 413.

sumed and implied conditions before stated, conditions which the defendant was to perform and which it did not perform. According to the weight of the American authority such a contract is severable to the extent that the mechanic may recover for work done up to the time of the fire.”

§ 58. *Where Default in Performance Willful.*

Where the default in full performance is the result of a willful refusal, the party is not entitled to any equitable relief and hence should not recover the benefits which the other has received by his part performance. Therefore, it is almost universally held that one who has agreed to do a prescribed thing for another for which he is to be paid a certain sum—as for example, to build a house or manufacture an article or deliver goods—cannot after partly carrying out his agreement abandon it and sue for the value of what he has performed.¹ So where a person is employed for a term at a certain salary or wage and before the end of the term he willfully and without legal cause abandons his employment, he can recover nothing for what he has done.²

“It cannot but seem strange to those who are in any degree familiar with the fundamental principles of law that doubts

¹ *Cochran v. Balfe*, 54 Pac. Rep. 399 (Colo.); *Springdale Assn. v. Smith*, 32 Ill. 252; *Riddell v. Peck-Williamson Co.*, 69 Pac. Rep. 241 (Mont.); *Jennings v. Camp*, 13 Johns. 94, 7 Am. Dec. 367; *Brown v. Fitch*, 38 N. J. (L.) 418; *Gillespie Tool Co. v. Wilson*, 123 Pa. St. 19, 16 Atl. Rep. 36; *Kelly v. Bradford*, 33 Vt. 35; *Malbow v. Birey*, 11 Wis. 107; *Moritz v. Larson*, 70 Wis. 569, 36 N. W. Rep. 331; *Cohn v. Plumer*, 60 N. W. Rep. 1000 (Wis.); *Dermott v. Jones*, 2 Wall. 1.

² *Timberlake v. Thayer*, 14 So. Rep. 446 (Miss.); *Turner v. Robinson*, 5 B. & Ad. 788; *Wright v. Turner*, 1 Stew. (Ala.) 29, 18 Am. Dec. 35; *Hutchinson v. Wetmore*, 2 Cal. 310, 56 Am. Dec. 337; *Elldridge v. Rowe*, 2 Gil. (Ill.) 91, 43 Am. Dec. 41; *Angle v. Hanna*, 22 Ill. 429, 74 Am. Dec. 461; *Swanze v. Moore*, 22 Ill. 63, 74 Am. Dec. 134; *Mortmann v. Léfaux*, 6 Mart. (La.) 654, 12 Am. Dec. 488; *Miller v. Godard*, 34 Me. 102, 56 Am. Dec. 638; *Peterson v. Mayer*, 46 Minn. 468, 49 N. W. 245; *Posey v. Garth*, 7 Mo. 94, 37 Am. Dec. 133; *Webb v. Duckeyfield*, 13 Johns. 389, 7 Am. Dec. 388; *McMillan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299; *Diefenback v. Stark*, 56 Wis. 462, 43 Am. Rep. 79.

Contra. The courts of several states (following *Britton v.*

should ever be entertained upon a question of this nature. Courts of justice are eminently characterized by their obligation and office to enforce the performance of contracts, and to withhold aid and countenance from those who seek through their instrumentality impunity or excuse for the violation of them. And it is no less repugnant to the well-established rules of civil jurisprudence than to the dictates of moral sense that a party who deliberately and understandingly enters into an engagement and voluntarily breaks it, should be permitted to make that very engagement the foundation of a claim to compensation for services under it."³

§ 59. *Money Paid for Use of Another.*

Where one person pays money for another under circumstances which make it right and just that it should be repaid, the law implies a contract on the part of the person benefited to repay it, without any actual agreement on his part.¹ Therefore when a person has been compelled by law to pay money which another was liable to pay and the latter has obtained the benefit of the payment he may be compelled to repay the sum.² But the payment must operate in discharge of some liability on his part, the discharge of a mere moral obligation or one not recognized in law or in equity will not create a lia-

Turner, 6 N. H. 48, 26 Am. Dec. 713), permit a partial recovery where the abandonment is willful, with a right in the defendant to set off such damage as he may have suffered from the plaintiff's breach of his agreement. *Duncan v. Baker*, 21 Kan. 107;; *Pixler v. Nichols*, 8 Iowa 106, 74 Am. Dec. 296; *Byerlee v. Mendel*, 39 Iowa 382; *Purcell v. McComber*, 11 Neb. 209, 38 Am. Rep. 366; *Coe v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *Riggs v. Horde*, 25 Tex. Supp. 456, 78 Am. Dec. 584; *Hollis v. Chapman*, 36 Tex. 1. The unsoundness of the doctrine of *Britton v. Turner* is effectively shown by Mr. Keener in his work on Quasi Contracts, p. 218-222. "Though an exception has been made in the case of building contracts . . . the rule in *Britton v. Turner* has never been the rule in this state." *Gruetzner v. Aude*, 28 Mo. (App.) 265; *Banse v. Tate*, 62 Mo. (App.) 150; *Blanton v. King*, 73 Mo. (App.) 148; *Earp v. Tyler*, 73 Mo. 617; *Lee v. Ashbrook*, 14 Mo. 378.

³ *Stark v. Parker*, 2 Pick. 267.

¹ *Lewis v. Campbell*, 8 C. B. 545; *Moule v. Garrett*, L. R. 7 Ex. 101; *Van Santen v. Standard Oil Co.*, 81 N. Y. 171.

² *Ralston v. Wood*, 15 Ill. 159; 58 Am. Dec. 604.

bility to repay.³ And the law does not imply any promise to repay one who voluntarily pays another's debt, for one is not allowed to make himself the creditor of another by paying his debt against his will or without his consent.⁴ If a person to preserve his own property is required to pay another's debt the latter becomes liable to repay him,⁵ as where one having purchased a chattel discovers a lien upon it given by the seller, and pays it to get a clear title,⁶ or one purchases goods which turn out to have been imported in violation of the revenue laws, and pays the penalty to avoid their forfeiture.⁷ So a surety discharging his principal's debt has an action against the principal, though the latter has made no express promise to repay,⁸ and likewise where one of two sureties pays more than his share.⁹

§ 60. *Failure of Consideration.*

Where money has been paid for a consideration which fails, the payor may recover it back on an implied contract to repay it,¹ as for example where one pays for goods which the seller fails to deliver,² or pays money on a contract to convey a piece

³ *Id.*

⁴ *Johnson v. Packet Co.*, L. R. 3 C. P. 43; *Winsor v. Savage*, 9 Metc. 346; *Seituate v. Hanover*, 9 Gray, 420; *Beach v. Vanderbilt*, 10 Johns 361; *Blanchard v. First Association*, 59 Me. 202; *Woodford v. Leavenworth*, 14 Ind. 311; *Oden v. Elliott*, 10 B. Mon. 313.

⁵ *Exall v. Partridge*, 8 T. R. 308;; *Edmunds v. Wallingford*, 14 Q. B. Div. 811; *Johnson v. Royal Mail Co.*, L. R. 3 C. P. 38; *Cole v. Malcolm*, 66 N. Y. 363; *Wells v. Porter*, 7 Wend. 119.

⁶ *Alford v. Cobb*, 28 Hun 22.

⁷ *Summers v. Clark*, 29 La. Ann. 93.

⁸ *Deering v. Winchelsea*, 2 B. & P. 270; *Kimble v. Cummins*, 3 Met. (Ky.) 327; *Gibbs v. Bryant*, 1 Pic. 118; *Appleton v. Bascom*, 3 Metc. 19; *Powell v. Smith*, 8 Johns. 249.

⁹ *Russel v. Feilor*, 1 Ohio' St. 327, 59 Am. Dec. 327.

¹ *Chapman v. Brooklyn*, 40 N. Y. 380; *Johnson v. Jennings*, 10 Gratt. 1, 60 Am. Dec. 323; *Nast v. Towne*, 5 Wall. 689; *Weed v. Centre R. Co.*, 138 Fed. 474.

² *Devaux v. Conolly*, 8 C. B. 640; *Manning v. Humphreys*, 3 E. D. Smith 218.

of land and it turns out that the vendor has no title to convey or refuses to convey.³ So as to money paid for the services of another which are performed so badly as to be quite useless to the employer;⁴ so, too, the buyer may recover the price paid to a seller who has impliedly warranted his title to the goods, when the goods prove to be stolen goods, which the buyer is compelled to restore to the true owner.⁵ But where one has obtained the thing he paid for, he cannot recover back the purchase price merely because it was at the time or has become of no value.⁶ And where the failure of consideration is only partial and the money paid is not by the terms of the contract apportionable with reference to the performance there can be no action for the money.⁷

(c)

PROMISES IMPLIED FROM EXPRESS ONES.

§ 61. *Introductory.*

Every contract will be construed by the court to include all matters which it is plain the parties intended to express but did not, and all matters which the law implies as part of the whole contract.

It is implied in every contract that neither party will interfere to prevent performance by the other.¹

In an oil or gas lease on a royalty, it is implied that the lessee will search for minerals with due diligence.² But there

³ *Pipkin v. James*, 1 Humph. 325, 34 Am. Dec. 652;; *Wright v. Coles*, 8 C. B. 150.

⁴ *Bolioch v. Jardine*, 3 H. & C. 700.

⁵ *Devaux v. Conolly*, 8 C. B. 640.

⁶ *Schwabenbach v. Odorless, etc., Co.*, 65 Md. 34, 57 Am. Rep. 301.

⁷ *Towers v. Barrett*, 1 Term Rep. 133; *Hunt v. Silk*, 5 East. 449; *Whencup v. Hughes*, L. R. 6, C. P. 78; *Simmons v. Putnam*, 11 Wis. 193.

¹ *Eaton v. Eaton*, 233 Mass. 351, 124 N. E. 37.

² *Carper v. United Fuel Gas Co.*, 89 S. E. 12, and see note L. R. A., 1917, A. 171.

is no implied agreement to make repairs, on the part of a landlord who leases premises to another,³ or to keep them in a condition satisfactory to the tenant.⁴

§ 62. *Usages of Trade and Business.*

Every trade, business or calling has its usages; and persons who make agreements relating thereto, assume that all the customary incidents of such agreements shall be part of the agreement and hence do not expressly refer to them. This is as true in the case of written as of oral contracts. In the hurry of bargain and trade and in all the transactions of busy men only the special particulars are written out and not those matters which each party takes it for granted are part of the agreement.¹ As well put by an English judge—if A was to agree to sell B a lion for a certain price, B might certainly refuse to receive the lion uncaged and with a chain and collar like a lap dog, if it were shown to be the custom to deliver wild animals in cages, even though the contract said not a word about a cage.² The owner of a city lot made an agreement with defendant to excavate it for a certain sum. Nothing was said as to what was to be done with the sand, but defendant proved a custom that in such cases it became the property of the excavator. And it was held that this being so, the court would presume that the parties intended this to be a term in the contract though not expressed.³

§ 63. *Implied Promises in Contracts of Sale.*

In contracts of sale of personal property, the buyer is held to impliedly warrant his title to the chattel, *i. e.*, that it is his

³ *Brown v. Dwight Man. Co.* 76 South 292.

⁴ "The lessees' eyes are his bargain." *Moore v. Weber*, 71 Pa. 429, 10 Am. Rep. 708.

¹ *Lawson, Usages and Customs*, §§ 20, 183.

² *Robertson v. Jackson*, 2 C. B. 412.

³ *Cooper v. Kane*, 19 Wend. 368; *Burton v. Jennings*, 185 Fed. 382, 107 C. C. A. 438.

to sell though he may have made no express promise on the subject,¹ and while, as a general rule, there is no implied warranty of the quality of the chattel where the buyer has an opportunity of examining it—the maxim of the common law *caveat emptor* applying²—yet where goods are sold for a particular purpose (that purpose and not any specific article being the essence of the contract) there is an implied warranty that they are reasonably fit for that purpose.³ Where an article is ordered to be manufactured, there is an implied promise that it shall be of merchantable quality.⁴ Where goods are sold by kind or description, there is an implied condition that the seller shall supply such goods as are commercially known under the description, and of a merchantable or salable quality, and in a merchantable state.⁵ Where goods are sold by a sample shown to the buyer, a warranty is implied that the goods delivered shall correspond in quality to the sample,⁶ and on a sale of articles of food intended for immediate domestic use, there is an implied promise that they are wholesome and fit for food.⁷

§ 64. *Implied Promises in Contracts of Agency and Service.*

One who agrees to perform a particular service, as agent, servant or employee, impliedly agrees to perform it faithfully,

¹ *Merley v. Attenborough*, 3 Ex. 500; *Gross v. Kierski*, 41 Cal. 111.

² *Barnard v. Kellogg*, 10 Wall. 383.

³ *Gerst v. Jones*, 32 Gratt. 521, 34 Am. Rep. 773; *Jones v. Just*, L. R. 3 Q. B. 197.

⁴ *Randall v. Newsom*, 2 Q. B. Div. 102.

⁵ *Wolcott v. Mount*, 38 N. J. (L.) 496; *Hawkins v. Pemberton*, 51 N. Y. 198.

⁶ *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122.

⁷ *Van Bracklin v. Fonda*, 12 Jons. 468, 7 Am. Dec. 339; *Hoover v. Peters*, 18 Mich. 51. There is no implied warranty on a sale to a dealer or as between dealers. *Wiedelman v. Keller*, 49 N. E. 210 (Ill.); *Hanson v. Hartse*, 73 N. W. 163 (Wis.); *Warren v. Buck*, 42 Atl. 976 (Vt.). A water company, it is held in a recent case, does not warrant anything as to the quality of the water it supplies. *Green v. Ashland Water Co.*, 77 N. W. 724 (Wis.). But

carefully, and with reasonable skill,¹ and that he will not use to the employer's detriment any private or confidential information which he may obtain during and on account of his employment.² He who offers his services in any calling or profession impliedly promises that he possesses and will use reasonable skill, judgment and diligence in his service.³ One holding himself out as a machinist and accepting employment to repair an engine is liable for damage caused by his unskillfulness.⁴ Where one contracts with another as agent, he impliedly warrants to that other that he has authority from his superior to make the contract.⁵ A principal impliedly promises the agent to reimburse him for any disbursements or losses he may be charged with in the conduct of the agency.⁶ All these cases are illustrative of the general principle that where:

“A relation exists between two parties, which involves the performance of certain duties by one of them, and the pay-

the contrary has been just decided in England as to a saloon-keeper selling beer to a customer. *Wren v. Holt*, 1 K. B. Div. 610 (1903). In a contract to dig a well there is no implied warranty as to obtaining water. *Skalsky v. Johnson*, 164 N. W. 978; *L. R. A.* 1918, A. 1084, and note.

¹ *Lawson, Rights, Remedies & Pr.*, 270; *Pump Co. v. Mfg. Co.*, 84 Mo. (App.) 204.

² *Robb v. Green*, 2 Q. B. Div. 1315.

³ As a physician or surgeon. *Vanhooser v. Bughoff*, 90 Mo. 487; *Ewing v. Goode*, 78 Fed. Rep. 442. An optician. *Price v. Ga. Nun*, 11 Misc. (N. Y.) 74. A teacher. *Barngrover v. Maack*, 46 Mo. (App.) 407. A lawyer. *Goodefroy v. Dalton*, 6 Bing. 467; *Chase v. Heaney*, 70 Ill. 265; *Bowman v. Tallman*, 27 How. Pr. 274. An architect. *Maack v. Schneider*, 57 Mo. (App.) 431. *Coombs v. Beede*, 89 Me. 187, 36 Atl. Rep. 104; *Chapel v. Clark*, 117 Mich. 638, 76 N. W. Rep. 62. Or any person undertaking to do work requiring special skill. *Van Northwick v. Holbine*, 86 N. W. Rep. 1057 (Neb.).

⁴ One holding himself out as a machinist and accepting employment to repair an engine is liable for damage caused by his unskillfulness. *Arkansas Machine Co. v. Moorhead*, 205 S. W. 980.

⁵ *Post*, § 194.

⁶ On a photographer agreeing to take a picture for a customer there arises an implied promise that the negative shall only be

ment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him.”⁷

used for the printing of such portraits as the customer may order or authorize. *Pollard v. Photographic Co.*, 40 Ch. Div.; *Moor v. Rugg*, 44 Minn. 28, 20 Am. St. Rep. 539.

⁷ *Morgan v. Ravey*, 6 H. & N. 265; *Lamb v. Evans*, 1 Ch. 218 (1893).

CHAPTER III.

THE FORM.

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§ 65. *The Different Kinds of Contracts.*

There is but one formal contract, viz., the *deed* or *contract under seal*; all others are *simple contracts* depending for their validity upon the presence of consideration. Therefore, contracts are divisible into two classes, (1) *contracts under seal* called also *deeds* or *specialties*, and (2) contracts *not* under seal, called also *simple* or *parol* contracts.

There is no distinct class of contracts merely in writing.¹ Statutes, however, have been passed from time to time which impose upon some simple contracts the necessity of some kind of form, and these stand in an intermediate position between the *deed* to which its form alone gives legal force, and the *simple contract* which rests upon consideration and is free from the imposition of any statutory form.²

¹ Perrine v. Cheeseman, 11 N. J. L., 19 Am. Dec. 388; Whitehill v. Wilson, 3 P. & W. 405.

² As to judgments sometimes called contracts of record, see ante § 45.

I.

CONTRACTS UNDER SEAL.

§ 66. *Introductory.*

The formal contract of our law is the *contract under seal*. It is called a *formal contract*, because it derives its validity from its form alone, and not from the fact of agreement, nor from the consideration which may exist for the promise of either party. The subject of deeds belongs to a work on Real Property and not to a work like this on the general subject of Contracts. It must be noted that the tendency of modern legislation is to do away with the seal and to treat such obligations as ordinary written contracts and to permit an ordinary writing to take the place of a sealed instrument in all cases where at common law the latter form was required. In some states the seal has been abolished by statute, in others it is only presumptive evidence of consideration. We shall therefore consider briefly in this place how the deed is made, what are its chief characteristics as distinguished from simple contracts, and under what circumstances it is necessary to contract under seal.

§ 67. *Contract Under Seal—How Made.*

A deed must be in writing or printed on paper or parchment.¹ It must be signed, sealed and delivered. At common law signing was not essential, but in the United States it is.²

Thus in England it is held that a deed is not within the Statute of Frauds, because the object of the statute was to prevent matters of importance from resting on the frail testi-

¹ Lawson Rights, Rem. & Pr., § 2226.

² Lawson Rights, Rem. & Pr., § 2270.

mony of memory alone. Before the Norman time, signature rendered the instrument authentic. Sealing was introduced because the people in general could not write. Then there arose a distinction between what was sealed and what was not sealed, and that went on until society became more advanced, when the statute ultimately said that certain instruments must be authenticated by signature. That means, that such instruments are not to rest on parol testimony only, and it was not intended to touch those which were already authenticated by a ceremony of a higher nature than a signature or a mark.^{2a}

A seal was always necessary, which at common law was an "impression on wax or paper or some other tenacious substance capable of being impressed,"³ and thus a printed impression of a seal on a paper is not a seal;⁴ nor a scrawl with a pen;⁵ nor a slit in the parchment with a ribbon run through it.⁶

"But the use of wax has almost entirely and, even of wafers, very largely, ceased. In short, sealing has become constructive rather than actual and is in great degree a matter of intention. * * * Any flourish or mark, however irregular or inconsiderable, will be a good seal if so intended; *ans a fortiori*, the same result must be produced by writing or printing the word seal or the letters # §, meaning originally *locus sigilli*, but now having acquired the popular force of an arbitrary sign for a seal, just as the sign '&' is held and used to mean 'and' by thousands who do not recognize it as the Middle Ages manuscript contraction for the Latin 'et'."

Witnesses are not essential to the validity of a deed unless required by statute,⁸ though as a matter of caution and for

^{2a} Cherry v. Hening, 4 Ex. 631.

³ 4 Kent. Com. 452; Perrine v. Cheeseman, 11 N. J. (L.) 14; 19 Am. Dec. 388.

⁴ Mitchell v. Union Life Ins. Co., 45 Me. 105, 71 Am. Dec. 529.

⁵ Warren v. Lynch, 5 Johns. 245; Hendrick v. Briggs, 15 Neb. 469.

⁶ Duncan v. Duncan, 1 Watts, 322. For the history of the origin and abolition of the seal, see 28 Am. Law Rev. 25.

⁷ Lorah v. Nissley, 156 Pa. St. 329; H. & W. 95.

⁸ 4 Kent Com. 451; Reinhart v. Miller, 22 Ga. 402, 68 Am. Dec. 506; Dole v. Thurlow, 12 Metc. 166.

the easier proof of its execution it is better to have a deed attested.⁹ By statutes in some states attestation is essential to a valid conveyance.¹⁰ Where a statute requires deeds to be executed in the presence of two witnesses, a deed executed in the presence of one only is void.¹¹

Delivery is essential to give effect to a deed, whether it be founded on a consideration or not.¹² Without delivery all the preceding formalities are unavailable;¹³ with delivery the deed becomes absolute, and cannot be defeated by the grantor by any subsequent act, unless by virtue of some power contained in it, or for fraud or the like.¹⁴ Delivery is effected either by actually handing the deed to the other party to it, or to a stranger for his benefit, or by words indicating an intention that the deed should become operative though it is retained in the possession of the party executing.¹⁵

Acceptance by the grantee is likewise essential, for the title will not pass until the deed has been accepted,¹⁶ and the grantee must accept before the rights of third parties have intervened; otherwise, he will take subject to their rights.¹⁷ But acceptance is presumed where the instrument is beneficial to the grantee.¹⁸

When a deed is delivered on a condition that it is not to take effect until something happens, during such period it is termed

⁹ *Dole v. Thurlow*, 12 Metc. 166.

¹⁰ *Meyhem v. Strong*, 6 Minn. 177, 80 Am. Dec. 441; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430.

¹¹ *Clark v. Graham*, 6 Wheat, 577.

¹² *Van Amringe v. Morton*, 4 Whart. 382, 34 Am. Dec. 517; *Jones v. Jones*, 6 Conn. 11, 16 Am. Dec. 35; *Saunders v. Blythe*, 112 Mo. 1; *Gorham v. Meacham*, 63 Vt. 231.

¹³ *Younge v. Gaildeau*, 3 Wall. 641; *Fisher v. Beckworth*, 30 Wis. 55.

¹⁴ *Lawson Rights*, Rem. & Pr., § 2276.

¹⁵ *Lawson*, Rights, Rem. & Pr., § 2276.

¹⁶ *Cabatt v. Norcross*, 35 N. H. 99; *Mitchell v. Ryan*, 3 Ohio St. 377.

¹⁷ *Bell v. Farmers' Bank*, 11 Bush, 34, 21 Am. Rep. 205; *Parmelee v. Simpson*, 5 Wall. 81;

¹⁸ *Lawson Rights*, Rem. & Pr., § 2276.

an *escrow*, but immediately upon the fulfillment of the condition it becomes operative and acquires the character of a deed.¹⁹ A delivery in escrow can only be made to a third person. If made to the grantee, or to the grantee's agent, it is not an escrow, and parol evidence that it was conditional is inadmissible; nor is it an escrow where the grantor retains the right of control over it.²⁰ The escrow takes effect immediately upon the performance of the condition without any formal delivery over by the depositary. The latter becomes at once the agent or trustee for the grantee.²¹

§ 68. *Estoppel by Deed.*

Statements made in a simple contract, though strong evidence against the parties to the contract, are not absolutely conclusive against them. Statements made in a deed are absolutely conclusive against the parties to the deed in any legal proceedings between them taken upon the deed.

“The principle is that where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted.”¹

Such a prohibition to deny facts is termed an *estoppel*.²

¹⁹ Lawson Rights, Rem. & Pr., § 2277.

²⁰ Lawson Rights, Rem. & Pr., § 2277; Campbell v. Thomas, 42 Wis. 437, 24 Am. Rep. 427.

²¹ Couch v. Meeker, 2 Conn. 302, 7 Am. Dec. 274; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592.

¹ Taunton, J., in Bowman v. Taylor, 2 Ad. & Ell. 278.

² VanRenssalaer v. Kearney, 11 How. 322; Howard v. Massengale, 13 Lea. 577; Dobbin v. Cruger, 108 Ill. 188. In Roberts v. Security Co. 1 Q. B. 111, A had applied for a policy of insurance against loss by burglary. The company accepted, and wrote that a policy would be issued. Later, after a burglary had occurred on A's premises, but without their knowing it, the company issued a policy under seal reciting that the premium had been paid, and kept it in the office for A to get it. It was held that the company was liable for the loss, as it was estopped from showing that the premium had not been paid.

§ 69. *Merger.*

Where two parties have made a simple contract for any purpose, and afterwards have entered into an identical engagement by deed, the simple contract is *merged* in the deed and becomes extinct.¹

§ 70. *Contract Under Seal Valid Without Consideration.*

A gratuitous promise, i. e., one for which the promisor obtains no consideration present or future, is binding if made under seal, though the same promise would be void if made verbally, or in writing not under seal.¹

In most States by statute want of consideration may be shown in defense to an action on a sealed instrument,² the presence of a seal being only presumptive evidence of a consideration. But under these statutes if the seal is used for the purpose of making binding a gratuitous promise where no consideration was intended, it will be held to have that effect.³

§ 71. *In What Cases Contract Under Seal Necessary.*

It is not necessary that a person shall, in making a contract, employ a deed, except in those cases where that form is required either by the rules of the common law or by statute. There are cases in which the common law demands that a contract shall be made under seal and these are: (a) gratuitous promises, (b) contracts of corporations, (c) conveyances of real estate.

(a) A gratuitous promise or contract for which there is no

¹ See post.

¹ Page v. Trugart, 2 Mass. 159, 3 Am. Dec. 41; Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761; Saunders v. Blythe, 112 Mo. 1.

² Stim. Am. St. Law, 4121; Wing v. Chase, 35 Me. 260.

³ Aller v. Aller, 40 N. J. (L.) 446; Bender v. Been, 78 Ia. 283.

consideration must be made by deed, otherwise it will be void.¹

(b) The common law rule as to contracts made with corporations was that a *corporation can only be bound by contracts under the seal of the corporation*. A corporation being a fictitious, not a natural, person, some evidence, it was said, is required that the aggregate of individuals composing it is really bound to that which the contract purports to promise, and this evidence is supplied by the use of the seal common to the corporation. But this requisite, in the United States at least, cannot be said any longer to exist, for it is now well settled that the contracts which a corporation has the power to make may be made in the same manner that a natural person would make them, in the absence of any special restriction in the charter.²

(c) A deed is essential to convey the legal title to real property.³ Whether this was a common law requisite or not⁴ it is certain that the word conveyance always meant a sealed instrument⁵ and the statutes of the different States generally require this formality.⁶

II.

SIMPLE CONTRACTS.

§ 72. *Simple Contracts.*

Having discussed the contract which acquires validity by reason of its form alone, we pass to the contract which depends for its validity upon the presence of consideration. In

¹ See Post, § 96.

² *Bank of Columbia v. Patterson*, 7 Cranch, 299.

³ *Crowell v. Maughs*, 7 Ill. 419, 43 Am. Dec. 62. See *Whiting v. Sweet*, 22 N. H. 10, 53 Am. Dec. 228.

⁴ See *Tiedeman on Real Prop.*, § 783.

⁵ *McCabe v. Hunter*, 7 Mo. 356.

⁶ See *Kingsley v. Holbrook*, 45 N. H. 311, 86 Am. Dec. 173.

other words, we pass from the formal to the simple contract, or from the contract under seal to the *parol* contract, so called because, with certain exceptions to which reference will now be made, it can be entered into by word of mouth. A contract (subject to the cases just noted where it is required to be made under seal, and subject to the cases in the next section where it is required to be evidenced by a writing) is therefore perfectly valid though entered into by word of mouth. Its terms may be more difficult to prove than they would be were they in writing—but the agreement is not illegal because it is oral.

§ 73. *Contracts Required to Be in Writing.*

The only contracts which, in the absence of a statute, are required to be in writing, outside of those requiring a seal, are bills of exchange and promissory notes. The necessity of writing, as evidence of agreement or as giving validity to the agreement, is, except in these cases, purely statutory. The most important statute of this class is the statute of frauds of 29 Charles II, two sections of which (the 4th and 17th) have been substantially re-enacted in most of the states.¹

III.

THE STATUTE OF FRAUDS, FOURTH SECTION.

§ 74. *Introductory.*

“*No action shall be brought* (1) to charge any executor or administrator upon any special promise to answer damages out of his own estate; or (2) to charge the defendant upon

¹ As to other cases where a writing is essential, the statutes of the state where the contract is made must be consulted. By the Federal statutes assignments of patents and copyrights; by the statutes of many of the states a promise of an infant to pay his debt made during infancy and an acknowledgment of a debt barred by statute; in Missouri an acceptance of a bill of exchange (*Dickinson v. March*, 57 Mo. (App.) 568; *Scudder v. Bank*, 91 U. S. (406) must be in writing.

any special promise to answer for the debt, default or miscarriage of another person; or (3) to charge any person upon any agreement made in consideration of marriage; or (4) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or (5) upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

This statute which takes its name from its original title, "An act for preventing of frauds and perjuries," was passed to remove the difficulty which the courts frequently found in determining the truth where one party set up an oral agreement and the other party denied that such an agreement had ever been made. To insure more reliable evidence as well as to remove the temptation to parties to swear to what was not true was the object of the statute.

This section of the statute will be considered under three heads, viz.: (a) The kinds of contracts included in it; (b) The form required by the statute; (c) The effect of non-compliance with its provisions.

(a)

WHAT CONTRACTS ARE WITHIN THE STATUTE.

§ 75. *Special Promise by Executor or Administrator.*

An executor or administrator may sue or be sued upon obligations devolving upon him as representative of the deceased, and it is his duty to carry out the directions of the deceased in respect to legacies and to distribute the estate according to the laws of descent and distribution. He is not bound to pay out his own money; his liabilities are limited by the assets of the estate in his hands. But if for any reason

he chooses to promise to answer damages out of his own estate the promise must be in writing; otherwise where the promise is to pay out of the estate he holds in trust.¹

§ 76. *Promise to Answer for "Debt, Default or Miscarriage of Another."*

(a) In order to fall within this clause there must be a *debt of another*¹ and hence the statute does not refer to an indemnity, or promise to save another harmless from the results of a transaction into which he enters at the instance of the promisor.²

Therefore a promise by C to indemnify B if he becomes bail or surety for A is not within the statute.³

In other words, there must be three parties in contemplation; A, who is actually or prospectively liable to B, and C, who, in consideration of some act or forbearance on the part of B, promises to answer for the debt, default, or miscarriage of A.⁴

(b) The "other," *i. e.*, the original debtor, must be primarily liable. If the original debtor be discharged, the promise

¹ Metc. Contr. 169; Bellows v. Sowles, 57 Vt. 164; McKeany v. Black, 117 Cal. 587, 49 Pac. Rep. 710 (Cal.); Bambrick v. Bambrick, 157 Mo. 423, 58 S. W. 8.

² Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Aldrich v. Ames, 9 Gray 76; Barry v. Ranson, 12 N. Y. 462.

³ The debt must not be the debt of the promisor or the debt of the promisee. Windell v. Hudson, 102 Ind. 521; Bailey v. Bailey, 56 Vt. 398; Green v. Estes, 83 Mo. 387; Doyle v. White, 26 Me. 341, 45 Am. Dec. 110; Gansey v. Orr, 173 Mo. 532, 73 S. W. 477.

⁴ Reader v. Kingham, 13 C. B. (N. S.) 344, overruling Green v. Creswell, 10 Ad. & Ell. 450 and earlier English cases. Anderson v. Spence, 72 Ind. 315, 37 Am. Rep. 162; Harrison v. Samtall, 10 Johns. 242, 6 Am. Dec. 337; Resseter v. Waterman, 151 Ill. 169, 37 N. E. 875; Deghe v. Morrison, 116 N. Y. 260, Contra, May v. Williams, 61 Miss. 125, 48 Am. Rep. 80; Bessig v. Britton, 59 Mo. 204; Garner v. Hudgins, 46 Mo. 397; Macey v. Childress, 2 Tenn. Ch. 438; Porter v. Blem, 78 South, 381, 1 A. L. R. 381, and note 383.

⁴ Rose v. Wollenberg, 31 Oreg. 269, 44 Pac. Rep. 382.

becomes an independent contract, is not within the statute, and need not be in writing.⁵

“In case one says to another, ‘Deliver goods to A, and I will pay you,’ it is binding, though by parol, because A, though he receives the goods, is never liable to pay for them. But if, in the same case, he says, ‘I will see you paid,’ or ‘I will pay, if he does not,’ or uses words equivalent, showing that the debt is in the first instance the debt of A, the undertaking is collateral, and not valid, unless in writing.”⁶

To ascertain whether an undertaking to pay the debt of another is collateral or original, the inquiry is: To whom was the credit given at the time of the sale and delivery of the goods?⁷ The original and collateral obligations may come into existence at the same time or at different times. It makes no difference whether the promise is, “if you will let A have the goods I will see you paid” or “if you will not sue A for six months for what he owes you I will see you paid.”⁸

(c) The liability of the third party must be continuous. If there be an existing debt for which a third party is liable to the promisee, and the promisor undertakes to be answerable for it, the contract need not be in writing if its terms are such that it effects an extinguishment of the original liability.⁹

⁵ *Anderson v. Davis*, 9 Vt. 126, 31 Am. Dec. 612; *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346; *Warren v. Smith*, 24 Tex. 484, 76 Am. Dec. 115; *Wallace v. Wortham*, 25 Miss. 119, 57 Am. Dec. 197; *Maurin v. Fogelberg*, 37 Minn. 23, 5 Am. St. Rep. 815.

⁶ *Nelson v. Boynton*, 3 Mete. 396, 37 Am. Dec. 148; *Birkmyer v. Darnell*, Salk. 27; 1 Sm. Lead. Cas. 57; *Nugent v. Wolfe*, 111 Pa. St. 476.

⁷ *Myer v. Grafflin*, 31 Md. 350, 100 Am. Dec. 66; *Bugbee v. Kendrick*, 130 Mass. 437; *Boyce v. Murphy*, 91 Ind. 1, 46 Am. Rep. 567. As to an oral promise by a stockholder to pay a debt of a corporation it is not within the statute if it amounts to an original promise, but it is if it be collateral. *Richardson Press v. Albright*, 224 N. Y. 497; 121 N. E. 362 and see note 8 A. L. R. 1198.

⁸ *Cole v. Hutchison*, 34 Minn. 410; *Mallory v. Gillett*, 21 N. Y. 412.

⁹ *Palmer v. Witcherly*, 15 Neb. 98; *Teters v. Lamborn*, 43 Ohio St. 144; *Wood v. Corcoran*, 1 Allen 406; *Runde v. Runde*, 59 Ill. 98,

(d) The promise must be made to the creditor and not to the debtor himself.¹⁰

(e) The liability of the promisor must be to answer for the debt, default or miscarriage out of his own property. Therefore if the promisor has funds or goods in his hands belonging to the debtor, from which or from whose proceeds he has authority¹¹ and is under a duty¹² to pay the debt, the promise is not within the statute, because the debt is really to be paid by the debtor; the responsibility assumed by the promisor being that of a trustee for the creditor.¹³

(f) The promise must not be merely incidental to a transaction, where the main intent of the promisor is to promote some interest of his own¹⁴ as where the holder of a promissory note transfers it for value and guarantees the payment of the note;¹⁵ or where an agent (called a *del credere* agent) undertakes, for an increased commission, to sell the goods of his employer and guarantee the solvency of the purchasers;¹⁶ or where the creditor of a third person has some lien or advantage for securing the debt which incumbers the property or may injuriously affect the interests of the promisor, and the promise is made in consideration of the relinquishment of such lien or advantage.¹⁷

¹⁰ Aldrich v. Jewell, 12 Vt. 125, 36 Am. Dec. 330; Eastwood v. Kenyon, 11 Ad. & E. 438; Green v. Estes, 82 Mo. 337; Johnson v. Huffaker, 99 Kas. 466, 162 Pac. 1150.

¹¹ Gower v. Stuart, 40 Mich. 747; Frame v. August, 88 Ill. 424.

¹² Fullam v. Adams, 37 Vt. 391, 397; Belknap v. Bender, 75 N. Y. 446, 451; Ackley v. Parmenter, 98 N. Y. 425, 430.

¹³ Wait v. Wait, 28 Vt. 350; Farley v. Cleveland, 4 Cow. 432; Walden v. Karr, 88 Ill. 49. A promise to accept a bill of exchange is not within the statute. Scudder v. Bank, 91 U. S. 406; Hall v. Cordell, 142 U. S. 116; Cordell v. Hall, 34 Fed. 866.

¹⁴ Benj. Princ. of Contr. 40; Bellows v. Sowles, 57 Vt. 164; Muller v. Riviere, 59 Tex. 640, 46 Am. Rep. 294; Bahe v. Squier, 148 N. Y. 81; Booth v. Eighmie, 60 N. Y. 238.

¹⁵ Cardell v. McNeil, 21 N. Y. 336; Milks v. Rich, 80 N. Y. 269; Dows v. Wett, 134 Mass. 142.

¹⁶ Wolf v. Koppel, 5 Hill 458, 2 Denio 368; Couturier v. Hastie, 8 Exch. 40; 5 H. L. 673.

¹⁷ Fitzgerald v. Dressler, 7 C. B. (N. S.) 374; Power v. Rankin, 114 Ill. 52.

(g) The statute includes liabilities arising out of wrong as well as out of contract. Thus where A wrongfully rode the horse of B without his leave, and killed it, and C promised to pay B a certain sum in consideration of his forbearing to sue A, this was held, a promise to answer for the *miscarriage* of another within the meaning of the statute.¹⁸

The promise must be accepted by the creditor. Where A wrote to B, a publisher, "Mr. F. informs me that you are about publishing an arithmetic for him and I will be answerable as far as fifty pounds," and the publisher made no reply to the letter, but proceeded to publish the arithmetic, it was held, in an action which he afterwards brought against A, that they could not treat his letter as a guarantee because they *had never accepted it*.¹⁹

§ 77. "*Agreements in Consideration of Marriage.*"

The agreement here meant is not a promise to marry (the consideration for this is the promise of the other party),¹ but a promise to make a payment of money or a settlement of property in consideration of, or conditional upon, a marriage actually taking place.² But a promise to marry which by its very terms was not to be performed within a year would fall within another clause of the statute.³

§ 78. "*Interest in or Concerning Lands.*"

The meaning of "contract or a sale of lands, tenements and hereditaments" is clear enough and is arrived at when once

¹⁸ *Kirkham v. Marter*, 2 B. & Ald. 613; *Duffy v. Wunsch*, 42 N. Y. 243; *Combs v. Harshaw*, 63 N. C. 198.

¹⁹ *Mozley v. Tinkler*, 1 C. M. & R. 692.

¹ *Short v. Stotts*, 58 Ind. 29; *Clark v. Pendleton*, 20 Conn. 495; *Blackburn v. Mann*, 85 Ill. 222; *Lewis v. Tapman*, 45 Atl. 459 (Md.).

² *Finch v. Finch*, 10 Ohio St. 501; 1; *Chase v. Fitz*, 132 Mass. 359; *Flenner v. Flenner*, 29 Ind. 564; *McAnnulty v. McAnnulty*, 120 Ill. 26; *Lloyd v. Fulton*, 91 U. S. 479; *White v. Bigelow*, 154 Mass. 593.

³ *Post* § 79, *Ullman v. Meyer*, 10 Fed. 241; *Derby v. Phelps*, 2 N. H. 515.

we know what is meant by lands, tenements and hereditaments. And these terms have a precise meaning in the law, as any work on Real Property will show. They denote the subject of real as distinguished from personal property, *i. e.*, goods and chattels. Every one knows what land is; tenements include every species of real property which may be held, or in respect of which a person may be a tenant,¹ while ‘hereditaments’ is employed in conveyances after ‘lands’ and tenements’ to include everything of the nature of realty which they do not cover.² Therefore a verbal contract for the purchase or sale of land, or of any kind of real property, is clearly within the statute.³ While it is not so easy to determine what is an ‘interest in land’ within the meaning of this section it is certain that the contract must be for a substantial interest in land, and not for arrangements preliminary to the acquisition of an interest, or for a remote and inappreciable interest.⁴

As to the produce of land, a distinction is made between what are called *fructus industriales* or growing crops of annual culture raised by the industry of man, and growing grass, timber or fruit upon trees, called *fructus naturales*, which come to man by the course of nature, unaided by his own exertions. The former are regarded as chattel interests and not within the statute.⁵ As to *fructus naturales*, if the contract for their sale contemplates the passing of the property thereon before it is severed from the soil, it is a sale of an interest in

¹ Abb. Law Dict. 548.

² Rapalje & L. Law Dict. 603.

³ Williams v. Gibson, 81 Ala. 228, 5 Am. St. Rep. 368; Davis v. Carnegie Steel Co., 244 Fed. 931, 157 C. C. A. 381; Diamon v. Wells, 226 S. W. 1016.

⁴ Murley v. Ennis, 2 Col. 300; Miller v. Roberts, 18 Tex. 16, 67 Am. Dec. 688; Mahagan v. Mead, 63 N. H. 130; Bruce v. Hastings, 41 Vt. 380, 98 Am. Dec. 592; Snyder v. Wolford, 33 Minn. 175, 53 Am. Rep. 22. A contract to give A a certain amount over a fixed sum if he finds a purchaser for B's land is not within the statute. Heyn v. Phillips, 37 Cal. 529.

⁵ Davis v. McFarland, 37 Cal. 634, 99 A. Dec. 340; Northern v. State, 1 Ind. 113. But see Kerr v. Hill, 27 W. Va. 576.

land,⁶ while if the crops are to be delivered as goods and to pass no title until severed, the contract is not within the statute, and no writing is required.⁷

But the subject of this section is one which belongs to the law of Real Property rather than to the law of Contract.

§ 79. *Agreements Not to Be Performed Within a Year.*

This phrase refers to such contracts only as are incapable on their face of being completely performed within a year from the time they are entered into.¹ Thus a contract of service for a year to begin on a future day² is within the statute and so of a lease for one year to begin in the future.³ A contract which by its terms cannot be performed within a year is not taken out of the statute because it may be terminated or defeated within the year.⁴ But although the agreement is not likely to be or not expected to be or not actually performed within one year from the making thereof, still it does not come within the statute, unless it cannot by any possibility be completed within a year.⁵

⁶ Green v. Armstrong, 1 Den. 550; Pattison's Appeal, 61 Pa. St. 294; Powers v. Clarkson, 17 Kan. 218; Crosby v. Wadsworth, 6 East, 602; Walton v. Lowry, 74 Miss. 484, 21 So. 234.

⁷ Leake on Contracts, 252; Claflin v. Carpenter, 4 Met. 580, 38 Am. Dec. 381; Poor v. Oakman, 104 Mass. 316; Purner v. Piercy, 46 Md. 212, 17 Am. Rep. 591; Leonard v. Medford, 85 Md. 666, 37 Alt. 365.

¹ Boydell v. Drummond, 11 East 142; Foote v. Emerson, 10 Vt. 338, 33 Am. Dec. 205; Bain v. McDonald, 111 Ala. 267, 20 South 77; Hand v. Osgood, 107 Mich. 55, 64 N. W. 867; Harper Co. v. Johnson, 244 Fed. 936, 157 C. C. A. 286.

² Sutcliffe v. Atlantic Mills, 13 R. I. 480, 43 Am. Rep. 39.

³ Jelett v. Rhode, 43 Minn. 166, 45 N. W. Rep. 13; Lowers v. Winter, 7 Cow. 263.

⁴ Meyer v. Roberts, 46 Ark. 80, 55 Am. Rep. 567.

⁵ Peter v. Compton, Skin. 353, 1 Sm. L. Cas. 283; Lyon v. King, 11 Metc. 411, 45 Am. Dec. 219; Worthey v. Jones, 11 Gray 170, 71 Am. Dec. 696; Blanding v. Sargent, 33 N. H. 239, 66 Am. Dec. 721; Laphan v. Whipple, 8 Metc. 87, 41 Am. Dec. 487; Frazer v. Gates, 118 Ill. 99; McPherson v. Cox, 96 U. S. 404; Walker v. Johnson, 96 U. S. 424.

The law on this subject is well summed up in an Iowa case in these words:

“It is not sufficient to bring a case within the statute that the parties did not contemplate performance within a year; but there must be a negation of the right to perform it within the year. This may be shown by an express stipulation in the contract that it shall not be performed within that time; by an express stipulation to be occupied more than that time in the performance; by a contract, the terms of which cannot, by possibility, be performed within the year; by a contract the terms of which show, though not in express language, that the party has no right to perform it within the year. Unless a contract comes within one of these classes it is not within the statute.”⁶

Therefore the following are *not* within this clause of the statute:

(a) Agreements to be performed on the happening of a contingency which may or may not arise within a year.⁷ As an agreement to pay a certain sum of money at another's death, for he may die within one year,⁸ or to pay money upon the return of a ship which might return within a year, although the ship in fact did not return within two years;⁹ or to pay a sum of money to a person on the day of his marriage, although the marriage did not take place within a year,¹⁰ or to marry, no time being mentioned, for it might take place within a year¹¹ or an insurance policy on goods for three years—for the loss and hence the promise to pay may occur at any time.¹²

(b) Agreements to pay money or render service until a

⁶ Blair Town Lot Co. v. Walker, 29 Ia. 411.

⁷ Trustees of Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; O'Neil v. Hynes, 145 Ind. 32, 43 N. E. 946; Baltimore Co. v. Callaghan, 82 Md. 106, 33 Atl. 460; Warner v. R. Co., 164 U. S. 410.

⁸ Updike v. Tenbrook, 32 N. J. (L.) 105; Kent v. Kent, 62 N. Y. 560, 20 Am. Rep. 502; Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100.

⁹ Anonymous, 1 Salk. 280; Clark v. Pendleton, 90 Conn. 495.

¹⁰ Peter v. Compton, Skin. 353, Sm. L. Cas. 283.

¹¹ Nichols v. Weaver, 7 Kan. 373.

¹² Springfield Ins. Co. v. De Jarnett, 19 South 995 (Ala.).

specific contingency which may arise within a year, as an agreement to work for another for an indefinite period,¹³ to support a person during life, or to educate a child; for such person may die within the year, in which event the agreement would be performed;¹⁴ or to employ a person as long as he could do his work properly;¹⁵ or the promisor had work for him¹⁶ or an agreement to labor for a company "for the term of five years, or so long as A shall continue to be agent of the company;"¹⁷ or a contract of partnership without any fixed time for its continuance, and the business of which may be completed within a year;¹⁸ or an agreement whose terms are not to be performed within a year but which give either party an option to determine it within a year.¹⁹

(d) Contracts not to do certain acts, as for instance not to engage in a certain business for a term of years or an indefinite term²⁰ as they are only personal engagements to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, and would be fully performed if the promisor died within the year.

(e) Contracts which may be or are performed within a year

¹³ *Hill v. Jameson*, 16 Ind. 125, 79 Am. Dec. 414; *Peters v. Westburgh*, 19 Pick. 364, 31 Am. Dec. 142.

¹⁴ *Murphy v. O'Sullivan*, 11 Jur. (Ir.) N. S. 111, 14 W. 407; *Weatherford v. R. Co.*, 30 S. W. Rep. 859; *Eiserman v. Schneider*, 37 Atl. Rep. 623 (N. J.).

¹⁵ *Harrington v. R. Co.*, 60 Mo. (App.) 223. So a promise by a railroad to retain the plaintiff in its employ so long as he should remain disabled from an injury received; inasmuch as recovery might happen within a year. *East Tenn. R. Co. v. Staub*, 7 Lea. 397.

¹⁶ *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117.

¹⁷ *Roberts v. Rockbottom Co.*, 7 Metc. 46.

¹⁸ *Jordan v. Miller*, 75 Va. 442.

¹⁹ *Blake v. Voight*, 134 N. Y. 69, 31 N. E. Rep. 256; *Standard Co. v. Curran*, 256 Fed. 68, 167 C. C. A. 310.

²⁰ *Hill v. Jameson*, 16 Ind. 125, 79 Am. Dec. 414; *Doyle v. Dixon*, 97 Mass. 212, 93 Am. Dec. 80; *Richardson v. Pierce*, 7 R. I. 330.

on one side, though they cannot be or are not performed within a year on the other.²¹

(f) Agreements where everything that is to be done under them is to be done within the year except the mere payment of money.²²

It is held that this clause of the statute applies to agreements to marry²³ but not to contracts concerning lands or any interest therein.²⁴

§ 80. *Other Agreements Which Are and Are Not Within the Statute.*

Some courts have construed the words of the statute "no action shall be brought" as applying only to a plaintiff who is suing on an agreement and not to a defendant who sets up an oral promise by way of defense or set-off.¹ But the majority of the courts hold that the oral agreement in cases within the statute is as invalid when set up by a defendant as when sued on by a plaintiff, because a different construction would lose sight of the very purpose of the statute.²

²¹ Donellan v. Reed, 3 B. & Ald. 809; Bracegirdle v. Heald, 1 Barn & Ald. 727; Durfee v. O'Brien, 16 R. I. 216; Berry v. Doremus, 30 N. J. (L.) 399; Compton v. Martin, 5 Rich. 14; Holbrook v. Armstrong, 10 Me. 31; Mackey v. Thisler, 53 Pac. 767 (Kan.). Some courts, however, hold that although that which one of the parties to the agreement is to do is all to be done within the year, still if the other party's promise is not to be performed within the year, the contract is within the statute. Whipple v. Parker, 29 Mich. 375; Sheehy v. Adarene, 41 Vt. 541, 98 Am. Dec. 623. But the party has a remedy not on the contract, but on an implied assumpsit.

²² Curtis v. Sage, 35 Ill. 22; Worden v. Sharp, 56 Ill. 104.

²³ Derby v. Phelps, 2 N. H. 515; Lawrence v. Cook, 56 Me. 190; Ullman v. Meyer, 10 Fed. 241; Contra: Lewis v. Tapman, 44 Atl. Rep. 459 (Md.).

²⁴ Fall v. Hazelrigg, 45 Ind. 586, 15 Am. Rep. 278; Young v. Dake, 5 N. Y. 463, 55 Am. Dec. 356.

¹ Abbott v. Inskep, 29 Ohio St. 59; Philbrook v. Belknap, 6 Vt. 383.

² Carrington v. Roots, 2 M. & W. 248; Reade v. Lamb, 6 Ex. 130; King v. Welcome, 5 Gray 41.

A promise which arises by operation of law is not within the statute;³ nor a parol declaration of trust in lands;⁴ nor instruments created under and deriving their obligation from special statutes, without the acceptance or assent of the party for whose ultimate benefit they were given;⁵ nor executed contracts.⁶

(b)

FORM REQUIRED BY THE STATUTE.

§ 81. *General Principles.*

The agreement is not void because not put in writing as required by the statute. The only effect of a non-compliance with its provisions is simply that no action may be brought until the omission is made good. The parties may carry out their oral engagements if they please, but the court will not hear evidence of any agreement within the statute unless it is put in the required form.¹

The refusal of a party to fulfill his promise to put it in writing is not such a fraud as will take the contract out of the statute.² A contract required by the statute to be in writing cannot be subsequently modified by parol.³ The statute, if relied on as a defense, must be pleaded, or it will be deemed waived.⁴ Its benefits are personal and can be relied on only

³ Smith v. Bradley, 1 Root 150; Goodwin v. Gilbert, 9 Mass. 510.

⁴ Wiser v. Allen, 92 Pa. St. 317.

⁵ Doolittle v. Dininny, 31 N. Y. 350.

⁶ Swanzy v. Moore, 22 Ill. 63, 74 Am. Dec. 134; Nutting v. McCutcheon, 5 Minn. 382; Brown v. Farmers Loan Co., 117 N. Y. 273; Weld v. Weld, 71 Kas. 622.

¹ Newton v. Bronson, 13 N. Y. 587; Bird v. Munroe, 66 Me. 337; Townsend v. Hargraves, 118 Mass. 334; Chicago Dock Co. v. Kinzie, 49 Ill. 289.

² Caylor v. Roe, 99 Ind. 1; Davis v. Stambaugh, 163 Ill. 557, 45 N. E. 170.

³ Abell v. Munson, 18 Mich. 306, 100 Am. Dec. 165; Platt v. Butcher, 112 Cal. 634, 44 Pac. 1060.

⁴ Maybee v. Moore, 90 Mo. 340; McClure v. Otrich, 118 Ill. 320.

by the parties or their privies.⁵ The agreement may be made at one time and the memorandum of it at any subsequent time⁶ between the formation of the agreement and the commencement of an action.⁷

§ 82. *Memorandum Must Show Complete Agreement.*

The note or memorandum must contain the terms of a complete agreement between the parties, and if any essential term is wanting the memorandum is insufficient.¹ This will be so if it appears therefrom that some of the details of the contract remain to be settled between the parties.² The property sold must be described, but what is a sufficient description is not very clear, in the light of conflicting decisions.³

⁵ Chicago Dock Co. v. Kinzie, 49 Ill. 289; Heuser v. Lamont, 55 Pa. St. 311.

⁶ Gale v. Nixon, 6 Cow. 445.

⁷ Bird v. Munroe, 66 Me. 337; Bill v. Bament, 9 M. & W. 36; Lucas v. Dixon, 22 Q. B. Div. 357. But as the action is not brought on the memorandum, but on the contract, would it not be more logical to hold that it might be made after the commencement of the action if before it is necessary to offer it in evidence to prove the contract? See Tiedeman, Sales, § 72; Remington v. Linthicum, 14 Pet. 92.

¹ Leake, Contr. 269; Baley v. Ogden, 3 Johns, 399, 3 Am. Dec. 509; Abell v. Radcliff, 13 Johns, 297, 7 Am. Dec. 377; O'Donnell v. Leeman, 43 Me. 50; Hastings v. Weber, 142 Mass. 232, 7 N. E. 846.

² Wardell v. Williams, 62 Mich. 50, 4 Am. St. 814.

³ Thus in Ryder v. Loomis, 161 Mass. 161: "My right in my father's estate was held sufficient." In Mead v. Parker, 115 Mass. 413, it was held that the words "a house on Church Street" sufficiently described the property. In Hodges v. Kowing, 58 Conn. 12, "his place in Stratford, containing about 15 acres" was held a sufficient description, but in Andrew v. Babcock, 63 Conn. 109, "a tract of land with all the buildings thereon, adjoining the New Haven and Derby R. R., in the town of Orange, and containing some twenty acres more or less," was said to be insufficient, though apparently the seller owned no other property answering the description. In Fortesque v. Crawford, 105 N. C. 29, "his land" was held "too vague and indefinite to admit parol evidence to locate the land." In Falls of Neuse Manufacturing Co. v. Hendricks, 106 N. C. 485, "his land where he now lives" was held sufficient if susceptible of identification by extrinsic evidence. In Jones v. Tye, 93 Ky. 390, "land adjoining the McKebly land" was held insufficient, the

The memorandum may be any kind of a writing; as for example, a letter;⁴ an invoice or bill of goods;⁵ brokers' bought and sold notes;⁶ or an entry on the books of the party making it.⁷ It need not be addressed or delivered to the other contracting party,⁸ for it may be contained in a letter addressed to a third person⁹ or in an answer or pleading in some other cause.¹⁰ It may be a sufficient memorandum though contained in a letter repudiating the alleged agreement.¹¹

“By keeping constantly in mind that it was not the primary object of the statute to confer a personal privilege upon a party to enable him at his pleasure to become recreant to his agreement (though it can be used in that way) but was rather to prevent others from forcing a spurious contract upon him by false swearing, it becomes apparent that whenever the party himself puts the terms of the contract in writing, the full purpose of the statute has been observed.”¹²

seller having two parcels answering that description. In *Holmes v. Evans*, 48 Miss. 247, “a piece of property on the corner of Main and Pearl Streets, city of Natchez, county of Adams, State of Mississippi,” was held insufficient because there was no reference in the memorandum itself to anything extrinsic that would define which corner was intended. In *Mellon v. Davidson*, 123 Pa. 298, “a lot of ground fronting about 190 feet on P. R. R. in the 21st ward Pittsburgh, Pa.,” was held insufficient, though the seller owned but one piece of land in the ward named. And in *Doherty v. Hill*, 144 Mass. 465, “estate on Congress St., owned by Sarah A. Hill,” was insufficient.

⁴ *Jackson v. Lowe*, 1 Bing. 9; *Peabody v. Speyers*, 56 N. Y. 230; *Moss v. Atkinson*, 44 Cal. 3; *McCartney v. Clover Valley Co.*, 232 Fed. 697; 146 C. C. A. 623.

⁵ *Schneider v. Norris*, 2 Maule & S. 286.

⁶ *Goom v. Aflalo*, 6 Barn. & C. 117; *Newberry v. Wall*, 84 N. Y. 576; *Greeley-Burnham Co. v. Capen*, 23 Mo. App. 301; *Elliot v. Barrett*, 144 Mass. 256.

⁷ *Johnson v. Dodgson*, 2 M. & W. 653; *Argus Co. v. Albany*, 55 N. Y. 495; *Tufts v. Plymouth Co.*, 14 Allen 407.

⁸ *Welford v. Beazely*, 3 Atk. 503; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343.

⁹ *Gibson v. Holland*, L. R. 1 C. P. 1; *Moore v. Montcastle*, 61 Mo. 425; *Cunningham v. Williams*, 43 Mo. (App.) 629.

¹⁰ *Jones v. Lloyd*, 117 Ill. 597; *Gordon v. Green*, 10 Ga. 534. But not in a deposition made involuntarily. *Cash v. Clark*, 61 Mo. (App.) 640.

¹¹ *Field v. Keiser*, 77 N. Y. Misc., 165.

¹² *Cash v. Clark*, 61 Mo. (App.) 642.

While no particular form is required of the memorandum,¹³ and it is not necessary that all the details of the agreement shall be given, yet it must state the contract with reasonable certainty (so that the substance of it can be understood without having recourse to parol proof)¹⁴ either directly from the writing itself, or by reference to some other instrument, record, or other matter by which such certainty may be had;¹⁵ and parol evidence is admissible for the purpose of identifying the subject-matter to which the writing refers.¹⁶

The note or memorandum may consist of several writings, if they are sufficiently connected together by internal reference, or by being so physically attached as to indicate an intention to make them a part of the memorandum¹⁷ and parol evidence is admissible to apply the references and to identify the writings referred to.¹⁸ But several writings cannot be connected by parol evidence only, without any internal reference or connection, for the purpose of making a note or memorandum to satisfy the statute.¹⁹

In the leading English case of *Boydell v. Drummond*,²⁰ the action was by publishers against a subscriber to an edition of Shakespearean engravings which was to run over a

¹³ *Hawley v. Brown*, 99 Mass. 545, 96 Am. Dec. 671; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661.

¹⁴ *Bailey v. Ogden*, 3 Johns. 399, 3 Am. Dec. 509; *Fry v. Platt*, 32 Kan. 62; *Smith v. Shell*, 82 Mo. 215; *Gray v. Smith*, 76 Fed. 525; *Ringer v. Holtzclaw*, 112 Mo. 519.

¹⁵ *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657; *Frazer v. Howe*, 106 Ill. 563.

¹⁶ *Barry v. Coombe*, 1 Pet. 640; *Tallman v. Franklin*, 14 N. Y. 584; *McConnell v. Brillhart*, 17 Ill. 354; *Oliver v. Hunting*, 44 Ch. D. 205.

¹⁷ *Tallman v. Franklin*, 14 N. Y. 584; *Orne v. Cook*, 31 Ill. 238.

¹⁸ *Peck v. Vandemark*, 99 N. Y. 29; *Morton v. Dean*, 13 Metc. 385; *Thayer v. Luce*, 22 Ohio St. 62; *Rhoades v. Castner*, 12 Allen 130; *O'Donnell v. Leeman*, 43 Me. 158; *Field v. Kieser*, 77 N. Y. Misc. 105.

¹⁹ *O'Donnell v. Leeman*, 43 Me. 158; *North v. Mendel*, 73 Ga. 400. See *Oliver v. Hunting*, 44 Ch. D. 205, and see Article 30 Am. Law Rev. 863.

²⁰ 11 East, 142.

year. There was a prospectus which the defendant had seen stating the terms and he had signed his name in a book headed "Shakespeare Subscribers, Their Signatures." It was held that as the prospectus and the book were not connected—there being no reference in the one to the other—they could not be connected by oral evidence and did not constitute a sufficient memorandum. In a later case it was said:

"The statute is not complied with unless the whole contract is either embodied in some writing signed by the party, *or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper.* Thus, a contract to grant a lease on certain specified terms is, of course, good. So, too, even if the terms are not specified in the written contract, yet if the written contract is to grant a lease on the terms of the lease or written agreement under which the tenant now holds the same, or on the same terms as are contained in some other designated paper, then the terms of the statute are complied with. The two writings in the case I have put become one writing. Parol evidence is, in such a case, not resorted to for the purpose of showing what the terms of the contract are, but *only in order to show what the writing is which is referred to.* When that fact, which, it is to be observed, is a fact collateral to the contract, is established by parol evidence, the contract itself is wholly in writing signed by the party."²¹

There are many cases where it would be a violation of reason to ignore a reference not in the agreement itself. The memorandum is signed, for instance, by one party only. The next day the other writes to the signer: "My son tells me that you signed our proposed agreement yesterday. I write to tell you that I adopt it." Parol evidence would be clearly admissible to show what agreement was meant.²²

An envelope, however, and a letter, which is shown by evidence to have been enclosed in it, are so connected together

²¹ Ridgway v. Wharton, 6 H. L. Cas. 238, 3 D. M. & G. 677; Andeson v. Hall, 273 Mo. 307, 202 S. W. 539.

²² Beckwith v. Talbot, 95 U. S. 289.

that the envelope may be used to supply the name of one of the parties to a memorandum.

“The envelope,” said Lopes, L. J., “was a necessary concomitant of the letter, which without it would not have reached its destination, and I think *they must be taken together as one document*.” “It is a matter of common knowledge,” said Chitty, L. J., “that formerly letters were written on one sheet of paper, which was folded up and indorsed with the name and address of the person to whom it was to be sent. Subsequently, about 1840, adhesive envelopes were introduced, and since then the old method has to some extent come into use again as a combination of letter and adhesive envelope. In my opinion it would be contrary to good sense to hold that there is any distinction between the effect produced by these three methods of sending a letter.”²³

And, where a purchaser of goods signed a memorandum in a paper book, in which orders were generally put, slipped into a leather cover, the name of the seller not appearing in the memorandum, but being stamped upon the cover, the statute was held to have been satisfied.²⁴

§ 83. *Must Show Parties.*

The memorandum must show who are the parties to the contract.¹ Thus where A promised B that he would answer for the debt of C, but the memorandum, though signed by A, did not contain the name of B it was held to be insufficient. “No document,” it was said, “can be an agreement or a memorandum of one, which does not show on its face who the parties making the agreement are.”² But a description of one of the contracting parties, though he be not named, will let in parol evidence otherwise inadmissible to show his

²³ Pearce v. Gardner, 1 Q. B. 688.

²⁴ Jones v. Joynor, 82 L. T. 678.

¹ Champion v. Plumer, 1 B. & P. 252; Sherborne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47; Mentz v. Neuwitter, 122 N. Y. 491, 25 N. E. 1044.

² Williams v. Lake, 2 E. & E. 349; Wieser v. Emerman, etc., Co., 185 N. Y. S. 79.

identity.³ So where A as agent for B enters into a contract with C in his own name, C may prove that he has really contracted with B, who has been described in the memorandum in the character of A.⁴

§ 84. *Consideration.*

On the ground that the word "agreement" as used in the statute includes the *consideration* as well as the promise, it was early held in the English courts that the consideration for the promise must appear in the memorandum.¹ This ruling has been followed in New York and some other States,² but the weight of authority in the United States appears to be the other way.³

§ 85. *Must Be Signed by Party Charged.*

By the "party to be charged" the defendant in the action is meant.¹ Therefore a memorandum signed by one party only is sufficient to charge him, although there be no signed writing upon which to bind the other party; and a person may be thus chargeable on a contract although the remedy on his part might fail for want of evidence to satisfy the statute.²

³ Jones v. Dow, 142 Mass. 130; Fessenden v. Mussey, 11 Cush. 127; Dykes v. Townsend, 24 N. Y. 57.

⁴ Trueman v. Loder, 11 Ad. & E. 589; Lerner v. Johns, 9 Allen 419; Violette v. Powell, 10 B. Mon. 347, 52 Am. Dec. 548.

¹ Wain v. Walters, 5 East, 10; 2 Sm. Lead. Cas. 280; Saunders v. Wakefield, 4 B. & A. 596.

² Sears v. Brink, 3 Johns. 210, 3 Am. Dec. 475; Justice v. Lang, 42 N. Y. 522, 1 Am. Rep. 576; Ide v. Stanton, 15 Vt. 685, 40 Am. Dec. 398. The words "for value received" sufficiently express the consideration. Osborne v. Baker, 34 Minn. 307, 57 Am. Rep. 55.

³ Packard v. Richardson, 17 Mass. 122, 9 Am. Dec. 123; Ives v. Hazard, 4 R. I. 14, 67 Am. Dec. 501; Gilligan v. Boardman, 29 Me. 31.

¹ Newby v. Rogers, 40 Ind. 9.

² Justice v. Lang, 42 N. Y. 498, 1 Am. Rep. 576; Mastin v. Grimes, 38 Mo. 478; Morin v. Martz, 13 Minn. 191; Wilkinson v. Heavenrich, 58 Mich. 574, 55 Am. Rep. 708.

The signature need not be an actual subscription of the party's name, it may be a mark, or initials;³ nor need it be in writing, it may be printed or stamped, or in pencil;⁴ nor need it be placed at the end of the document, it may be at the beginning or in the middle;⁵ if intended to be a signature, and as such to be a recognition of the contract.⁶ Thus an unsigned writing in the third person, as "Mr. A B agrees," in the handwriting of A B, is sufficient.⁷

§ 86. *Signing by Agent.*

The statute permits the signing to be done by an agent duly authorized, and therefore provided one has the necessary authority his signature will bind his principal. But the agent must be some third person and cannot be the other contracting party.¹ If the agent signs in his own name, the other party may show that the contract was really made with the

³ Sanborn v. Flagler, 9 Allen 418; Brown v. Bank, 6 Hill 443; Palmer v. Stephens, 1 Denio 408.

⁴ Drury v. Young, 58 Md. 542, 42 Am. Rep. 345; Clason v. Bailey, 14 Johns. 484; Western v. Myers, 33 Ill. 424; Kleine v. Kleine, 219 S. W. (Mo.) 610 and see note 8 A. L. R. 1339.

⁵ Clason v. Bailey, 14 Johns. 484; Coddington v. Goddard, 16 Gray 436; James v. Patten, 8 Barb. 344. Aliter where the statute uses the word "subscribed." James v. Patten, 6 N. Y. 9, 55 Am. Dec. 376; Champlin v. Parrish, 11 Paige 405.

⁶ Selby v. Selby, 3 Mer. 2; Lucas v. James, 7 Hare 419; Braley v. Kelly, 25 Minn. 160. See note in A. L. R. 1917 A. 153, as to place of signature generally.

⁷ Propert v. Parker, 1 R. & M. 625; Kilday v. Shancupp, 98 Atl. 335 (Conn.).

¹ Sharman v. Brandt, L. R. 6 Q. B. 720; Hinkley v. Arey, 27 Mo. 362; Wilson v. Lewiston Mill, 150 N. Y. 314, 44 N. E. 959; Springer v. Kleinsorge, 83 Mo. 152. The return by the sheriff endorsed on the execution of the highest bid made at an executor sale held sufficient. Woodruff v. Piedmont Trust Co., 92 S. E. 496 (N. C.) and see note L. R. A. 1917 E. 899; Hart v. Jahn (Mont.), 196 P. 158.

principal.² In some States the authority in the case of dealing with lands must be in writing.³

(c)

EFFECT OF NON-COMPLIANCE.

§ 87. *Agreement Not Void but Simply Unenforceable.*

A contract of the kind specified in this section of the statute, and not in writing, is not void, for the effect of non-compliance with its provisions is simply to prevent it being enforced by an action, or in other words it is incapable in a judicial tribunal of being proved orally. In *Leroux v. Brown*,¹ the plaintiff sued upon a contract not to be performed within the year, made in France and not reduced to writing. French law does not require writing in such a case, and by the rules of private international law the validity of a contract, so far as regards its formation, is determined by the law of the place where it is made, called the *lex loci contractus*. The procedure, however, in trying the rights of parties under a contract, is governed by the law of the place where the action is brought, called the *lex fori*, and the mode of proof thus depends on the law of the country where action is brought. If, therefore, the statute avoided contracts made in breach of it, the plaintiff could have recovered, for his contract was good in France where it was made, and the *lex loci contractus* would have been applicable. If, on the other hand, the statute affected procedure only, the contract, though not void, was incapable of proof in the English courts.

² Dykers v. Townsend, 24 N. Y. 57, 60; Sanborn v. Flagler, 9 Allen, 477; Trueman v. Loder, 11 Ad. & E. 589.

³ See post. § 168. But such a requirement does not apply to an executive officer of a corporation. McCartney v. Clover Valley Co., 232 Fed. 697, 146 C. C. A. 623; 1 A. L. R. 1127 and note 1132; Light Co. v. Paragould, 225 S. W. 435.

¹ 12 C. B. 801.

The plaintiff tried to show that his contract was void by English law, in which case he would have been successful, for there would have been nothing to hinder his proving first the contract, and then the French law which made it valid. But the court held that the statute dealt with procedure only, that the existence of the contract was not affected by it, but that it was rendered incapable of proof and the plaintiff therefore could not recover.²

The converse of this proposition is also true. Had the statute of frauds existed in France at the time the contract was made, but not in England, where the suit was brought, the action would have been sustained in England, though it could not have been in France.³ Therefore it was correctly ruled in Missouri (construing the words in the 17th section of the statute to mean that the contract was void and not simply unenforceable)⁴ that if the contract was valid in the State where it was made it might be sued on in Missouri, be-

² Downer v. Chesebrough, 36 Conn. 39; Heaton v. Eldridge, 56 Ohio St. 87, 46 N. E. Rep. 638. In Pritchard v. Norton, 106 U. S. 134, Mr. Justice Miller said: "A contract valid by the laws of the place where it is made, although not in writing, will not be enforced in the courts of a country where the statute of frauds prevails, unless it is put in writing. Leroux v. Brown, 12 C. B. 801. But where the law of the forum and that of the place of the execution of the contract coincide it will be enforced, although required to be in writing by the law of the place of performance, as was the case of Scudder v. Union Nat. Bank, 61 U. S. 406, because the form of the contract is regulated by the law of the place of its celebration and the evidence of it by that of the forum." Buhl v. Stephens, 84 Fed. 922; Kleeman v. Collins, 9 Bush. 460. Other courts have failed to notice this distinction. Thus in Pennsylvania it was laid down that a contract made in New Jersey where this statute was in force could not be enforced in Pennsylvania where no such statute existed. Allshouse v. Ramsay, 6 Wheat, 331. And this ruling is not without support in other ill-considered cases, decided on the mistaken assumption that the requirement of writing affects the validity of the contract. See Dacosta v. Davis, 24 N. J. L. 331; Denny v. Williams, 5 Allen 1.

³ Downer v. Chesebrough, 36 Conn. 39, 4 Am. Rep. 29; Scudder v. Union Nat. Bank, 91 U. S. 406.

⁴ See post, § 95.

cause the statute of that State declared that no such contract as that sued on "shall be allowed to be good."⁵

The necessity of a writing may be waived by the one sought to be bound.⁶ An action will not lie to recover the consideration paid upon an oral agreement for the purchase of lands, if the vendor is willing to fulfill.⁷

Where a party to an agreement not in writing under the statute fails to execute it, the price advanced, or the value of articles delivered in part performance of the contract, whether in money, labor, or chattels, may be recovered back. In such cases, the law raises, by implication, a promise to pay advances made upon the faith of the contract, and for which no consideration has been paid.⁸

§ 88. *Part Performance.*

And because a contract which does not fulfill the requirements of the statute is not void, but merely unenforceable, courts of equity often enforce them, and dispense with the evidence required by the statute where it would amount to a fraud to allow the statute to apply or where¹ one of the parties has performed his part of the contract.² Marriage is not an act of performance that will take an oral agreement in consideration of marriage out of the statute.³

⁵ *Houghtaling v. Ball*, 20 Mo. 563.

⁶ *Montgomery v. Edwards*, 46 Vt. 151, 14 Am. Rep. 618; *Westfall v. Parsons*, 16 Barb. 645.

⁷ *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351; *Coughlin v. Knowles*, 7 Met. 57, 39 Am. Dec. 759.

⁸ *Smith v. Smith*, 28 N. J. (L) 208, 78 Am. Dec. 49; *Banker v. Henderson*, 58 N. J. (L) 26, 32 Atl. Rep. 70.

¹ *Ham v. Massasoit Real Estate Co.*, 107 Atl. 205 (R. I.).

² See post, Chap. XIX; § Specific Performance; *Brown v. West Maryland R. Co.*, 99 S. E. 457 (W. Va.).

³ *Hunt v. Hunt*, 171 N. Y. 396.

THE STATUTE OF FRAUDS, 17TH SECTION.

§ 89. *Introductory.*

By the seventeenth section of the English statute, it is provided:

“No contract for the sale of any goods, wares, or merchandise, for the price of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or some note or memorandum in writing of the said bargain be made and signed by the parties to be charged or their agents thereunto authorized.”

The same questions arise here as under the fourth section, viz.: (a) The kinds of contracts included in it; (b) the form required by the statute; (c) the effect of non-compliance with its provisions. In regard to (b) the form required where in the absence of a part acceptance and receipt or a part payment, a note or memorandum is necessary, the rules already stated as applicable to contracts under the fourth section apply also to contracts under the seventeenth section.

WHAT CONTRACTS ARE WITHIN THE STATUTE.

(a)

§ 90. *“Goods, Wares and Merchandise.”*

In England it is held that these words in the statute include only corporeal personal property, and therefore have no application to contracts for the sale of shares of stock, accounts, choses in action and the like.¹ But in the United States this phrase embraces all objects of traffic and commerce, therefore bonds, stocks, mortgages and promissory notes are

¹ *Humble v. Mitchell*, 11 Ad. & Ell. 205.

within the statute.² And contracts for the produce or fruits of the soil are within this section of the statute, where they are *fructus industriales* or, being *fructus naturales*, are not to pass until severed from the soil. These as we have seen are not an "interest in land" within the fourth section, and are therefore, chattels, within this section.³

It was the English law, until altered by legislation, that the statute did not apply to executory contracts of sale, *i. e.*, agreements for the future delivery of goods, but was restricted to executed contracts, *i. e.*, those in which the title passed at once or in which an immediate performance was intended. But the American courts have uniformly held that both executory and executed contracts of sale are within the statute.⁴ And the statute applies to all forms of sale, to auction sales as well as private sales.⁵

§ 91. *Contracts for Work and Labor.*

A contract for work and labor is not within the statute;¹ but where one agrees to manufacture an article for another the courts have found it hard to determine whether the contract is for work, labor and materials, or for goods, wares and merchandise, and three different doctrines are held as to this.

(a) In New York and Maryland an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made

² *Tisdale v. Harris*, 20 Pick. 9; *Broadman v. Cutter*, 128 Mass. 388; *Greenwood v. Law*, 55 N. J. (L.) 168; not however the sale by a partner of his interest in the partnership; *Vincent v. Viethis*, 60 Mo. (App.) 9.

³ See ante, § 78; *Holt v. Holt*, 57 Mo. (App.) 272.

⁴ *Tiedeman Sales*, § 56.

⁵ *Id.*

¹ *Phipps v. McFarlane*, 3 Minn. 109, 74 Am. Dec. 743; *Prescott v. Locke*, 51 N. H. 94, 12 Am. Rep. 55.

from iron in the vendor's hands), is not a contract of sale within the statute.²

(b) In Massachusetts, and so large a number of other States, that it is stated by a writer on Sales to be the "prevalent American doctrine," a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, if the goods are to be manufactured specially for the purchaser, and upon his special order, and not for the general market, the contract is not within the statute.³

(c) The modern English doctrine dates from *Lee v. Griffin*,⁴ decided in 1861. In this case the action was on an oral contract for the manufacture by a dentist of a set of false teeth, and the defense was that it was within the statute of frauds and therefore unenforceable because not in writing. The plaintiff argued that it was a contract for work, labor and skill, and though some materials were furnished, they were unimportant and secondary. But the court held that it was a contract for the sale of goods, wares and merchandise and within the statute. The test adopted by the court was, *does the contract result in the sale of a chattel?* If so it is within the statute.

"I think that in all cases," said Blackburn, J., "in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labour done and materials provided, we must look at the particular contract entered into between the parties. *If the contract be such that when carried out it would result in the sale of a chattel, the party can-*

² Crookshank v. Burrell, 18 Johns. 58, 9 Am. Dec. 187; Deal v. Maxwell, 51 N. Y. 652.

³ Goddard v. Binney, 115 Mass. 450, 15 Am. Rep. 115; Spencer v. Cone, 1 Metc. 283; Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256. See Tiedeman Sales, § 584.

⁴ 1 B. & S. 272. For a concise review of the conflicting English decisions on this subject before *Lee v. Griffin*, see Burdick on Sales, p. 12-14.

not sue for work and labour; but if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. . . . I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.”

The rule in *Lee v. Griffin*, has been adopted in a few cases in this country.⁵

The New York rule it will be seen looks to the time of the formation of the contract and the American (Massachusetts) rule to the nature of the contract, while the modern English rule looks to the time of the performance of the contract. The latter is simple, logical and easy of application and would doubtless be adopted by still other courts were it not that their decisions made prior to *Lee v. Griffin* preclude them.

§ 92. *Value.*

Nearly all the States which have adopted this section follow the fifty dollars of the English statute, though in Maine, New Jersey, Missouri and Arkansas the limit is thirty dollars, in New Hampshire thirty-three dollars, in Vermont forty dollars, in California and Idaho two hundred dollars, and in Florida

⁵ *Prescott v. Locke*, 51 N. H. 9; *Brooks v. Sanborn*, 21 Minn. 402; *Hardell v. McClure*, 1 Chand. (Wis.) 271; *Meincke v. Falk*, 55 Wis. 427; *Pratt v. Miller*, 18 S. W. Rep. 965; 109 Mo. 78; *Burrell v. Highleyman*, 33 Mo. (App.) 183; *Monument Co. v. Geary* (Mo. App.), 240 S. W. 506.

and Iowa there is no limit of value at all.¹ Where several articles are purchased at one time then if the combined value is over the statutory limit, the contract is within the statute although the value of no one article reached the statutory limit.² But if the purchase of each article was a separate transaction then the contract is not within the statute, unless the value of that article reached the statutory limit.³

(b)

FORM REQUIRED BY STATUTE.

§ 93. *Acceptance and Receipt.*

The statute excepts cases from its operation where "the buyer shall accept part of the goods so sold and actually receive the same." The rule is that acceptance and receipt requires a delivery of and taking the possession as a matter of fact, to be decided by the court or jury upon the circumstances.

"In order to satisfy the statute, there must be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intention of taking the possession as owner."¹

¹ Stimson Am. Stat. Law. 462.

² Baldey v. Parker, 2 B. & C. 37.

³ Id. Tiedeman Sales, § 61. "The mere fact that a separate price is agreed upon for each article, or even that each article is laid aside as purchased, makes no difference, so long as the different purchases are so connected in time or place in the conduct of the parties, that the whole may be fairly considered as one transaction. Such is the common case of a number of articles purchased at private sale of a shopman, for instance, at the same time, though at separate prices." Weeks v. Crie, 48 Atl. Rep. 107 (Me.).

¹ Phillips v. Bistolli, 2 B. & C. 517; Snow v. Warner, 10 Met. 132. 43 Am. Dec. 417; Houghtaling v. Ball, 19 Mo. 84, 59 Am. Dec. 331; Hewes v. Jordon, 39 Md. 472, 17 Am. Rep. 578; Harlan v. Carney (Mich.), 189 N. W. 27.

Delivery alone, without acceptance and receipt, is not enough;² nor is receipt and acceptance, if the vendor did not intend to deliver the goods. Both parties must concur in the acts.³

Acceptance and receipt are not synonymous, the former being a mental operation through which the party determines to assume proprietorship over the goods, while the latter is the taking possession of them either by the party or his agent.⁴ There may be an acceptance without a receipt, as where the goods have been selected and approved by the buyer, but remain in the possession of the seller; and there may be a receipt without an acceptance, as where the goods are taken into his possession by the buyer for the purpose of examining them before he accepts them.⁵ Both acceptance and receipt are essential to take the case out of the statute.⁶ The receipt and acceptance need not be contemporaneous with the contract, but may be subsequently made;⁷ nor need they be concurrent with each other, either may precede the other.⁸

But it is not essential that the goods pass into the hands of the buyer to constitute a receipt of them; it is sufficient that the seller holds them in a different character as for example as the bailee of the buyer.⁹

If the buyer refuse to receive the goods, he cannot be held on his oral contract of purchase, and his reasons for refusing

² *Maxwell v. Brown*, 39 Me. 98, 63 Am. Dec. 605; *Young v. Blaisdell*, 69 Me. 275; *Scotten v. Sutler*, 37 Mich. 526.

³ *Smith v. Hudson*, 6 Best. & S. 431; *Young v. Blaisdell*, 60 Me. 274; *Matthiessen, etc., Co. v. McMahon*, 38 N. J. (L.) 536.

⁴ *Tiedeman Sales*, § 66.

⁵ *Tiedeman Sales*, § 66.

⁶ *Id.*

⁷ *Bush v. Holmes*, 53 Me. 417; *Marsh v. Hyde*, 3 Gray 331; *Rickey v. Tenbroeck*, 63 Mo. 563.

⁸ *Garfield v. Paris*, 96 U. S. 536; *Pinkham v. Mattox*, 53 N. H. 604; *Knight v. Mann*, 118 Mass. 143.

⁹ *Bicknell v. Omyhee Sheep Co.*, 31 Idaho 693, 176 Pac. 782 and note 1 L. R. A. 902.

are not material.¹⁰ The statute, of course, does not require a delivery of goods sold, where the contract is in writing, or there is a statutory memorandum of it,¹¹ or where the purchase-money, or part of it, is paid.¹²

§ 94. "*Earnest or Part Payment.*"

The statute also excepts from its operation the cases in which "the buyer shall give something in earnest to bind the bargain, or in part payment." The word "earnest" as used in the statute has not received much attention from the courts. The meaning intended by the framers of the statute was probably the giving to the vendor a nominal sum, not a part of the price, as a token that the parties were in earnest or had made up their minds.¹ But this method of binding the bargain has been rarely used, and in this country the word is held to mean a part payment of the price.²

The part payment must be something of value, though it need not be money.³ A promise to pay to the seller's creditor, accepted by the latter, who thereupon discharges the seller, is a part payment within the statute.⁴ But a mere promise to pay,⁵ or a tender of payment not accepted is not sufficient.⁶

¹⁰ Phillips v. Bistolli, 2 Barn. & C. 511; Knight v. Mann, 118 Mass. 145; Hewes v. Jordan, 39 Md. 489, 17 Am. Rep. 578.

¹¹ See ante, § 82.

¹² Pierce v. Gibson, 2 Ind. 408; see post, § 89.

¹ Rap. & L. Law Dict., § 428.

² Howe v. Hayward, 108 Mass. 54. In Missouri it is said that while it was a custom under the common law to give something to bind the bargain, and in the Roman law one species of earnest was a payment which went to the seller if the sale was not carried out by the buyer, but was credited on the price if it was, and was to be returned with a like sum if the seller did not complete, yet in modern times "earnest" means part payment of the price and therefore a sum of money put up to be forfeited to the non-defaulting party is not an "earnest or part payment." Jennings v. Dunham, 60 Mo. (App.) 635; Scott v. Mundy (Iowa), 186 N. W. 207.

³ Combs v. Bateman, 10 Barb. 573; Dow v. Worthen, 37 Vt. 180.

⁴ Cotterill v. Stevens, 10 Wis. 422; Tiedeman Sales, § 71.

⁵ Artcher v. Zeh, 5 Hill 205.

⁶ Edgerton v. Hedge, 41 Vt. 676; Hicks v. Cleveland, 48 N. Y. 84.

In most of the States the part payment may be made at any time before the action is brought.⁷ But in New York a part payment will not take a contract out of the statute, unless the part payment is made at the time of making the contract.⁸ If it is made subsequently, it must be made and received for the express purpose of fulfilling the statute, or when made, the parties must substantially restate and reaffirm the terms of the contract.⁹

(c)

EFFECT OF NON-COMPLIANCE.

§ 95. *Under This Section Contract Void.*

The words of the seventeenth section are not as in the fourth section that "no action shall be brought" on the agreement, but that it "shall not be allowed to be good," or "shall not be valid." In England the weight of recent opinion is in favor of holding that, notwithstanding the difference of language, the seventeenth section like the fourth¹ is only a law of procedure² and the contract is not void, but only unenforceable.

⁷ Thompson v. Alger, 12 Metc. 435; Davis v. Moore, 13 Me. 424.

⁸ Allis v. Reed, 45 N. Y. 142; Bissell v. Balcom, 40 Barb. 98. Reserved in part in 39 N. Y. 275.

⁹ Hunter v. Wetsell, 57 N. Y. 375, 15 Am. Rep. 508, 84 N. Y. 548, 38 Am. Rep. 544.

¹ See ante, § 87.

² Pollock Cont. 4th Ed., p. 605. In Leroux v. Brown, 12 C. B. 809 (ante, § 82), it was assumed by the court that the words of section seventeen, unlike those of section four, go to the existence of the contract. But it has been intimated by Brett, L. J., in Britain v. Rossiter, 11 Q. B. Div. 123, and by Lord Blackburn in the recent case of Madison v. Alderson, 8 App. Cas. 479, that there is no difference in the effect of the two sections. In Bailey v. Sweting, 1 B. & S. 272, a letter admitting a purchase of goods was held to be a sufficient memorandum to satisfy the statute, which must mean that the requirements of the statute do not not affect the validity of the contract, but only the proof of it; for if the statute avoided a contract which did not satisfy its terms, a subsequent note or memorandum of a void transaction would be of no effect. But there is no direct decision on this point in England. Anson Contr. 67.

In Missouri it has been expressly held that the words of the seventeenth section, unlike the fourth, relate to the existence of the contract.³ That the agreement is void and not simply voidable seems to be the opinion of other courts⁴—an opinion certainly at variance with the intent of the statute.⁵

³ *Houghtaling v. Ball*, 20 Mo. 563.

⁴ *Alderton v. Buchoz*, 3 Mich. 322; *Miller v. Wilson*, 34 N. E. Rep. 1111 (Ill.); *Wolfe v. Burke*, 18 Colo. 264, 32 Pac. Rep. 427.

⁵ *Bird v. Munro*, 66 Me. 337; *Cash v. Clark*, 61 Mo. (App.) 640; *Townsend v. Hargraves*, 118 Mass. 325; *Rice v. Randolph* (Kan.), 206 P. 314; *Fried v. Lonski* (N. D.), 188 N. W. 582. See also *Seder v. A. O. U. W. (Ida.)*, 206 P. 1052.

CHAPTER IV.

THE CONSIDERATION.

Section 96. Consideration Essential to Simple Contracts.

- 96a. History of Consideration.
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§ 96. *Consideration Essential to Simple Contracts.*

To every simple contract a consideration is essential,¹ and it makes no difference whether the agreement is in writing or by word of mouth.² In an early English case Lord Mansfield ruled that a promise if in writing was binding without consideration, saying that consideration was simply necessary for the sake of supplying evidence of the promisor's intention to bind himself, and that where this was supplied by other forms, as by writing, it was not required.³ But his view was later declared to be erroneous in *Rann v. Hughes*,⁴ decided in

¹ 9 Cyc. 309, 13 C. J. 312; *Kilborn v. Pyne*, 279 Fed. 864.

² 9 Cyc. 310.

³ *Pilans v. Van Mierop*, 3 Bun. 1663.

⁴ 7 T. R. 350.

1765. In this case an administratrix had promised in writing to answer damages out of her own estate. There was no consideration for the promise, but it was contended that the writing required by the statute of frauds rendered a consideration unnecessary.⁵ But the highest tribunal in England said:

“It is undoubtedly true that every man is, by the law of nature, bound to fulfill his engagements. It is equally true *that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration.* Such agreement is ‘*nudum pactum ex quo non oritur actio*,’ and whatever may be the sense of this maxim in the civil law, it is in the last sense only that it is to be understood in our law. . . . All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class as some of the counsel have endeavored to maintain, as contracts in writing. *If they be merely written and not specialties, they are parol and a consideration must be proved.*”

It makes no difference that the one to whom the promise was made suffered damage through relying or acting upon it.⁶ The consideration for a written contract need not appear upon its face, but may be proved by parol, or inferred from the terms of the agreement.⁷

§ 96a. *History of Consideration.*

The evidence of the intention of the parties to an agreement is supplied by Form and Consideration, either one or

⁵ For a history of the doctrine of Consideration see 2 Pollock & Maitland Hist. of English Law, pp. 183-230; Anson Contr. 44-50; Hare Contr., Chaps. VII, VIII.

⁶ Bragg v. Danielson, 141 Mass. 195, 4 N. E. 622; Crowther v. Farrar, 15 Q. B. 677, 15 Jur. 535; Gerhard v. Bates, 1 C. L. R. 868, 2 E. & B. 476. Contra. Watkins v. James, 50 N. C. 105; Ricketts v. Scothorn, 67 Neb. 51, 77 N. W. Rep. 365. A and B were joint owners of a vessel and A voluntarily undertook to get her insured, but neglected so to do, and the vessel was lost; *held*, that B could not sustain an action against A for breach of promise. Thorne v. Deas, 4 Johns. 84; Frauenthall v. Dew, 19 Cent. L. J. 429.

⁷ Attix v. Pelan, 5 Iowa 336; Tingley v. Cutler, 7 Conn. 291; Patchin v. Swift, 21 Vt. 202; Thompson v. Blanchard, 3 N. Y. 335.

both are required to make it enforceable. Anson¹ in a brief history of the doctrine of Consideration states that English law starts with two distinct conceptions of contract, one that a promise is binding if expressed in a certain form, the other that the acceptance of a benefit imports a liability to pay for it. But the enforcement of an informal promise because a benefit was to accrue to the promisor was not known until the end of the 15th century. How, then, he asks, did informal executory contracts become actionable, and how did consideration become the test of it?

“To answer the first question we must look to the remedies which in the early history of our law were open to persons complaining of the breach of a promise, express or implied. The only actions of this nature during the thirteenth and fourteenth centuries were the actions of covenant, of debt and of detinue. Covenant lay for breach of promises made under seal; debt for liquidated or ascertained claims, arising either from breach of covenant or from non-payment of a certain sum due for goods supplied, work done or money lent; detinue lay for the recovery of specific chattels kept back by the defendant from the plaintiff. These were the only remedies based upon contract. An executory agreement therefore, unless made under seal was remediless.

The remedy found for such promises is a curious instance of the shifts and turns by which practical convenience evades technical rules. The breach of an executory contract until comparatively recent times gave rise to a form of the action of trespass on the case.

This was a development of the action of trespass: trespass lay for injuries resulting from immediate violence: trespass on the case lay for the consequences of a wrongful act, and proved a remedy of a very extensive and flexible character.

Note the process whereby this action came to be applied to contract. It lay originally for a malfeasance or the doing an act which was wrongful *ab initio*; it next was applied to a misfeasance or improper conduct in doing what it was not otherwise wrongful to do and in this form it was applicable to promises part-performed and then abandoned or negligently executed to the detriment of the promisee; finally and not

¹ Contracts (1919) § 65-71.

without some resistance on the part of the courts it came to be applied to a mere non-feasance or neglect to do what one was bound to do. It was in this form that it adapted itself to executory contracts. The first reported attempt to so apply it was in the reign of Henry IV when a carpenter was sued for a non-feasance because he had undertaken (*quare assumpsisset*) to build a house and had made default. The judges in that case held that the action, if any, must be in covenant and it did not appear that the promise was under seal.

But in course of time the desire of the common law courts to extend their jurisdiction and their fear lest the chancery by means of the doctrine of consideration, which it had already applied to the transfer of interests in land, might enlarge its jurisdiction over contract, produced a change of view. Early in the sixteenth century it was settled that the form of trespass on the case known henceforth as the action of assumpsit would lie for the non-feasance or non-performance of an executory contract; and the form of writ by which this action was commenced perpetuated this peculiar aspect of a breach of a promise until recent enactments for the simplification of procedure."

The *quid pro quo*, says Anson, which furnished the ground for the action of debt, and the detriment to the promisee on which was based the delictual action of assumpsit were both merged in the general conception of consideration as it was developed in Chancery, where in the absence of form, evidence of the meaning of a contract would be found in the practical results of it. When a promise came before the courts they asked no more than this: "Was the party making the promise to gain anything from the promisee, or was the promisee to sustain any detriment in return for the promise?" If so, there was a *quid pro quo* for the promise and an action might be maintained for the breach of it.

§ 97. Cases Where Consideration Not Essential.

Without being exceptions to the rule in the last section there are cases where a consideration is not essential, viz.:

(a) Contracts under seal as we have seen are binding by reason of their form irrespective of the question of consideration.¹

(b) The promise of a gratuitous service, although not enforceable as a promise, involves a liability, if undertaken to use ordinary care and skill in performance.²

(c) A statutory obligation on a bond or the like which is authorized by law needs no consideration to support it.³

(d) In the case of negotiable instruments a consideration is presumed to exist and need not be proved, and the burden of proof rests on the party disputing the fact. If, however, he can show that, as between himself and the party suing, no consideration was given for the making or indorsement of the bill or note, the promise fails, as it would do in any other case of simple contract under like circumstances.⁴ In several States by statute a written instrument is presumed to be

¹ See ante § 70. "In order to reconcile the idea that consideration is essential to a contract with the well-known rule of law that a contract under seal is binding without regard to there being a consideration therefor, it has been asserted that a seal 'imports a consideration,' or 'is conclusive evidence of a consideration.' Such statements are not merely erroneous, but absolutely misleading as to the very nature of a sealed instrument. As we have seen, it has been the rule for ages that the evidence afforded by a deed can only be overcome by evidence of an equally high character. The fact that a man has bound himself by deed is conclusive evidence that he is bound, not that he received a consideration for his promise. Nevertheless, so widespread is the erroneous idea that there is a real connection between the seal and the doctrine of consideration, that statutes have been passed in New York, and other states, providing that a seal 'shall be only presumptive evidence of a consideration.' The effect of such statutes is to change, not a rule of evidence, but the very nature of contracts under seal. A specialty is binding by reason of its form; a promise not under seal only by virtue of some consideration. The New York statute has the effect of making all contracts depend for their validity upon the existence of some consideration." Harriman, *Contr.* (1 Ed.), p. 53.

² See Lawson *Bail.*, § 33.

³ *Carpenter v. Mather*, 4 Ill. 374; *Mittnacht v. Kellermann*, 105 N. Y. 461, 12 N. E. 28.

⁴ *Conine v. Junction, etc., R. Co.*, 3 Houst. (Del.) 288, 89 Am. Dec. 230; *William v. Forbes*, 114 Ill. 167, 28 N. E. 463.

founded on a consideration, thus placing all writings on a level with negotiable instruments.⁵

§ 98. *Consideration Defined.*

Consideration has been defined as "some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other"¹ or more briefly, a benefit to the promisor or a detriment to the promisee.²

Another good definition is *an act or forbearance called for and induced by the promise.*³ It is not essential that any benefit shall accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom

⁵ *County of Montgomery v. Bauchley*, 92 Mo. 127; *Houck v. Frisbie*, 66 Mo. (App.) 13.

¹ *Hammond v. Hussey*, 51 N. H. 40, 12 Am. Rep. 41; *Weld v. Nichols*, 17 Pick. 538; *Smucker v. Lawrence*, 21 Ill. 267. In strictness consideration is of two kinds, viz.: good and valuable. Good consideration is that of blood or natural affection, as where a man makes a grant to a near relation, being founded on motives of duty or generosity. 2 Bla. Com. 297. A promise founded on a "good" consideration is a gratuitous one. (*Keefer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171; *Kennedy v. Ware*, 1 Pa. St. 445, 44 Am. Dec. 145; *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508) and will not support an executory contract. *Fink v. Cox*, 18 Johns. 145. Deeds made upon good consideration only are considered as merely voluntary; and although they may be valid at law between the parties, are not aided in equity; and they are liable to be held void as against creditors and purchasers for value. *Stovall v. Bennett*, 4 Litt. 208; *Washband v. Washband*, 27 Conn. 424. A valuable consideration is the consideration defined above. Practically the verbal distinction is not recognized and when the courts speak of a contract being founded on a "good" consideration, they mean a "valuable" one. Marriage is a valuable consideration. *Chichester v. Vass.*, 1 Munf. 98, 4 Am. Dec. 531; *Dugan v. Gittings*, 3 Gill, 138, 43 Am. Dec. 306; *Bottling Co. v. Coca Cola Co.*, 269 Fed. 796.

² *Drake v. Lanning*, 49 N. J. (Eq.) 452, 24 Atl. Rep. 822; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79. For definitions of considerations and illustrations, see 9 Cyc. 311, 313, 317, 13 C. J. 311,

³ *Harriman Contr.* (2 Ed.) § 91; *Lingart v. Mfg. Co.* (N. Y.), 238 S. W. 758.

it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction.⁴

§ 99. *Money or Money Value not Requisite.*

Money or something which has a money value is of course a consideration, but it is clear from the definitions that all that is necessary to constitute a valuable consideration is that the promisor does or promises to do something which he is not bound to do or refrains or promises to refrain from doing something which he has a right to do.¹

If A promises B to pay him five dollars if he will not eat a dinner or ten dollars if he will not wear his best coat for a day, B's abstaining from eating his dinner and refraining from wearing his coat is sufficient to support A's promise, for B has a legal right to do both of these things. In a New York case, an uncle promised a nephew that if he would refrain from drinking liquor, using tobacco, swearing and playing certain games for money until he came of age, he would pay him \$5,000. The nephew kept his side of the bargain, but when sued for the money the uncle claimed that the agreement was not founded on a valid consideration. But the court said:

"It is sufficient that he restricted his lawful freedom of action within certain limits upon the faith of his uncle's agreement."²

So where an uncle wrote to his nephew that if he would marry a certain person he would make him a certain allowance,³ or if he would take a trip to Europe for his health and

⁴ *Hamar v. Sidway*, 124 N. Y. 538; *Brown v. Ray*, 10 Ired. 72, 41 Am. Dec. 379; *Hilton v. Southwick*, 17 Me. 303, 35 Am. Dec. 253; *Carr v. Card*, 34 Mo. 513.

¹ 9 Cyc. 315, 13 C. J. 324. But the *quid pro quo* seems essential in Alabama, *Kirksey v. Kirksey*, 8 Ala. 131; *Bibb v. Freeman*, 59 Ala. 612.

² *Hamer v. Sidway*, 124 N. Y. 538; see *Talbott v. Stemmons*, 89 Ky. 222; *Lindell v. Rokes*, 60 Mo. 249, 21 Am. Rep. 395.

³ *Shadwell v. Shadwell*, 9 C. B. N. S. 150.

education, he would pay his expenses;⁴ where a man promised another a sum of money if he would name his child after him⁵ and where a divorced husband promised his former wife a stated annuity, if she would conduct herself with sobriety and in a respectable, orderly and virtuous manner.⁶

Thus it will be seen that actual detriment is not essential—it was clearly a benefit and not an injury for the nephew to abstain from tobacco and liquor, and to have a foreign trip at another's expense. It was not likely to be an injury to him to marry the woman the uncle had selected, and how could one be hurt by naming a child after another? And as to the divorced wife, what actual damage could her promise do her? In all these cases there was clearly a benefit and not an injury. Yet there was a legal detriment in abstaining from exercising a legal right. The nephews had a legal right to smoke, to drink and to marry someone else and to remain in the United States; a person has a legal right to name his child as he wishes and the divorced wife, in the words of the court, had: a legal right "to get drunk in her own or a friend's house, to consort with people, male or female, of bad character, and to allow a paramour to have connection with her, so far as any obligation to her former husband was concerned."

The promise must be to abstain from a *legal* right. J. R. agreed to pay J. J. a yearly sum of money, for which the latter agreed that it should come to an end if he, J. J., should continue to reside in S, or should interfere with or annoy J. R. personally or by letter, or messenger, or should make any claim to his property, or should not conduct himself in a proper and becoming manner as a member of society. It was held that all these promises were good except the one not to interfere with or annoy J. R. "A promise that a person will

⁴ Devecmon v. Shaw, 69 Md. 199, 14 Atl. 464, or if he would attend a certain school, Hoshor v. Kautz, 19 Wash. 258.

⁵ Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16.

⁶ Dunton v. Dunton, 18 Vict. L. R., 46 Alb. L. J. 11 (1892).

not do what he lawfully may is a good consideration. But a promise not to do what is unlawful is not.”⁷

The doctrine of estoppel was applied to a case where an old gentleman said to his granddaughter, handing her his note for \$2,000: “I have fixed something that you do not have to work any more; none of my grandchildren work and you don’t have to.” She made no promise, but relying on the money, she gave up her job in a store. The court held that there was no contract. The note was a mere promise to make a gift. But the grandfather having intentionally influenced the girl to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit his executor to resist payment on the ground that the promise was made without consideration. It would therefore be enforced by way of an estoppel which has been defined as a right, “arising from conduct which has induced a change of position in accord with the intention of the other party.”⁸

§ 100. *Adequacy of Consideration.*

Whether or not the consideration is adequate to the promise is immaterial. So long as the party gets what he contracted for, the courts are not concerned about its value to him or whether it is at all equivalent to what he promised in return.¹ To do otherwise would be “the law making the bargain, instead of leaving the parties to make it.”² It is sufficient if the consideration is such as the law deems valuable without

⁷ Jameson v. Renwick, 17 Vict. L. R. 124.

⁸ Ricketts v. Scothern, 57 Neb. 51, H. & W. 181.

¹ 9 Cyc. 365, 13 C. J. 365; Mulhall v. Mulhall, 41 Pac. 114, 3 Okl. 304; Mound City Co. v. Dawson, 65 Cal. 425; Clark v. Sigourney, 17 Conn. 511; Spann v. Baltzell, 1 Fla. 301, 44 Am. Dec. 346; Brooks v. Ball, 18 Johns 237; Gravely v. Barnard, L. R. 18 Eq. 518; Bolton v. Madden, L. R. 9 Q. B. 55.

² Pilkington v. Scott, 15 M. & W. 660; Elam v. Redby Co. (N. C.), 109 S. E. 632.

regard to its nature or character.³ The slightest consideration is sufficient to support the most onerous obligation.⁴

In *Bainbridge v. Firmstone*,⁵ F asked permission of B to weigh his boilers, which B granted, and in consideration of which F promised to return them in as good condition as he received them. He did not do so and B sued him. F contended that the permission to weigh boilers was neither detriment to B nor benefit to F, and was therefore not a consideration to support his promise. But the court said:

“The defendant had some reason for wishing to weigh the boilers; and he could only do so by obtaining permission from the plaintiff, which permission he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused permission.”

In another case the defendant promised the plaintiffs that if they would return him a written guaranty which they had of his he would pay certain bills. The plaintiffs did so, but it was afterwards discovered that the guaranty was not legally enforceable against the defendant, and was worth no more than a piece of paper; and it was argued that it was therefore no consideration for the defendant's promise. But the court said:

“The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong

³ *Brown v. R. C.* 99 S. E. 457 (W. Va.)

⁴ *Thornborrow v. Whitacre*, 2 Ld. Ray; 1164; *Darrow v. Walker*, 48 N. Y. (S. C.) 6; *Judy v. Louderman*, 48 Ohio St. 562, 27 N. E. 181; *Churchill v. Bradley*, 58 Vt. 403, 5 Atl. 189, 56 Am. Rep. 563; *Sanders v. Carter*, 91 Ga. 450, 17 S. E. 345. One dollar is a sufficient consideration to support a lease. *Rich v. Donaghey*, 177 Pac. 86 (Ohio) and see note 1 A, L. A. 381.

⁵ 8 Ad. & Ell. 743.

to it? It cannot be ascertained that that value was what he most regarded; he may have had other motives and objects, and of their weight he was the only judge."⁶

So where A promised B that if he would give him a letter he possessed written by C, that he wanted to use in a law suit, he would pay him one thousand pounds,⁷ this was held a good consideration, though the letter did him no good.

But the consideration, though it may be inadequate must be real.⁸ Therefore one cent has been held insufficient to support a promise to pay \$600,⁹ and one dollar insufficient to support a promise to pay \$1,000, the court in the first case saying :

"It is true that as a general proposition inadequacy of consideration will not vitiate an agreement. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value for money, or perhaps for some other thing of indeterminate value. In this case, had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken; as it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void at first blush, upon its face, if it be regarded as an earnest one. The consideration of one cent is plainly, in this case, merely nominal, and intended to be so."

§ 101. *In Equity.*

Mere inadequacy of consideration is not even in equity a sufficient ground for resisting the specific performance of a contract.¹ But courts of equity will take an account in cases

⁶ Haigh v. Brooks, 10 Ad. & Ell. 309; Churchill v. Bradley, 58 Vt. 403, 26 Am. Rep. 563; Kinsman v. Parkhurst, 18 How. 289.

⁷ Wilkinson v. Oliveira, 1 Bing. N. C. 490.

⁸ See § 103.

⁹ Schnell v. Neil, 17 Ind. 29, 79 Am. Dec. 453; Shepard v. Rhodes, 7 R. I. 470.

¹ 9 Cyc. 367, 13 C. J. 366, post Chap. XIX.

which come before them the inadequacy of the consideration, and if a contract is sought to be avoided on the ground of fraud or undue influence, it will be regarded as corroborative evidence thereof.²

§ 102. *Consideration Executed or Executory.*

The consideration for a promise may be *executed* or *executory*. An *executed consideration* is some act performed or some value given at the time of making the promise and in return for the promise then made. An agreement upon an executed consideration arises where one of the parties has in the act which amounts to an offer or an acceptance, as the case may be, done all that he is bound to do under the agreement, leaving an outstanding liability on the other side only. An *executory consideration* is a promise to do or to give something, or to forbear from doing something, in return for some other promise or thing done.

§ 103. *Promise for a Promise.*

A promise to do an act or to forbear from doing an act is just as valuable a consideration for a promise as the act or forbearance would be. Where mutual promises are made the one furnishes a sufficient consideration for the other.¹ But it is essential that the promise shall be (a), certain; (b), legal; (c), possible of performance; (d), concurrent in time with the other, and (e), impose a legal liability upon the promisor.

(a) An offer as we have seen may be so vague and uncertain

² 9 Cyc. 367, 13 C. J. 366. Gifford v. Thorn, 9 N. J. (Eq.) 702; Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375; Beard v. Campbell, 2 A. K. Marsh, 125, 12 Am. Dec. 362; Davidson v. Little, 22 Pa. St. 245, 60 Am. Dec. 81; Cole v. Trecothick, 9 Vesey 246; Harlow v. Kingston, 173 N. W. 368 (Wis.); Anderson v. Anderson (Ky.), 240 S. W. 1061.

¹ 9 Cyc. 323, 13 C. J. 326. Rowan Co. v. Hull, 47 S. E. Rep. 92 (W. Va.); Appleton v. Chase, 19 Me. 74; Coleman v. Eyre, 45 N. Y. 38.

as not to be legally enforceable,² and it follows that a promise of this nature cannot form a legal consideration.³

(b) The promise must be to do something which is not illegal.⁴

(c) The promise must not be to do something which is (1) physically or (2) legally impossible and known to both parties to be so at the time it is made. (1) Physical impossibility means practically impossibility according to the state of knowledge of the day,⁵ as for example a promise to go from New York to London in one day or to discover treasure by magic or to go round the world in a week,⁶ or a promise made on

² Ante, § 11.

³ In *White v. Bluett*, 23 L. J. Ex. 36, an action was brought by executors upon a promissory note made payable to the testator by his son, the defendant in the action. The son pleaded a promise made by his father to discharge him from all liability in respect of the note in consideration of his ceasing to make certain complaints which he had been in the habit of making, to the effect that he had not enjoyed as many advantages as the other children. The court said that the promise given by the son was no more than a promise "not to bore his father," and was too vague to support his father's promise to discharge the son from liability on the note. "A man might complain that another person used the highway more than he ought to do, and that other might say, 'do not complain and I will give you £5.' It is ridiculous to suppose that such promises could be binding. So if the holder of a bill of exchange were suing the acceptor and the acceptor were to complain that the holder had treated him badly or that the bill ought never to have been circulated and the holder were to say, 'Now, if you will not make any more complaints I will not sue you,' such a promise would be like that now set up. In reality there was no consideration at all." But see *Sharon v. Sharon*, 68 Cal. 29, 8 Pac. 614, criticised in 22 Cent. L. J. 6 and *Little v. McCarter*, 89 N. C. 233.

⁴ See post.

⁵ *Clifford v. Watts*, L. R. 5 C. P. 588. "Thus a promise by one in New York, to speak at once to a person in Chicago, or to fly ten thousand feet high, might have been looked upon as absurd seventy-five years ago, while today one may reasonably promise either." *Ashley*, Contr. § 47.

⁶ *Le Roy v. Jacobosky*, 48 S. E. 796 (N. C.), citing 9 Cyc. 326; Indian Contract Act, § 56; *The Harriman*, 9 Wall. 261. In a recent case a covenant by an applicant for life insurance that he would not die by his own hand while insane was held void, on the ground that it was one impossible to observe, and known to be so by both parties. *Kelley v. Mut. L. Ins. Co.*, 109 Fed. 56.

March 15th that a ship would sail on February 12th.⁷ But if the promise be within the range of possibility, however absurd or impossible the idea of its execution may be, it will be upheld, as where one covenants that it shall rain tomorrow or that the pope shall be at Westminster on a certain day. To bring the case within the rule of impossibility it must appear that the thing to be done cannot by any means be accomplished; for if it is only improbable or out of the power of the obligor it is not in law deemed impossible.⁸ (2) An impossibility in law⁹ apparent when the agreement is made, is illustrated by the promise in an old case by one person, without authority from another, to discharge a debt due the latter, because no one without authority from the creditor could release a debt due to him.¹⁰ So of a promise "that plaintiff's tract of land shall sell for a certain sum by a given day," for no man can force the sale of another's property by a given day or by any day as of his own act;¹¹ or to transfer a license, when the law did not allow such transfers;¹² or to marry by one already married and known to be so by the promisee.¹³

The performance must be "objectively impossible, because the same inference cannot be drawn, if it is subjective. If performance is objectively possible, there may be a contract even though it is impossible for the given promisor.¹⁴ A promise to paint a portrait is objectively possible, but never-

⁷ Hall v. Cozenove, 4 East. 477.

⁸ Watson v. Blossom, 4 N. Y. (Supp.) 489, 18 N. Y. St. 726; Beebe v. Johnson, 19 Wend. 500, 32 Am. Dec. 518; The Harriman, 9 Wall. 161, 19 L. Ed. 629; Thornborrow v. Whitacre, 2 Ld. Raym. 1164.

⁹ See Gregory v. Arms, 48 Ind. App. 562, 96 N. E. 196.

¹⁰ Harvey v. Gibbons, 2 Lev. 161. But see Waterman v. Dutton, 6 Wis. 265.

¹¹ Stevens v. Coon, 1 Pinn. (Wis.) 365; Specht v. Collins, 81 Tex. 213, 16 S. W. 934. An agreement to convey property not belonging to the promisor at the time it is made is valid. Trask v. Vinson, 20 Pick. 105; Stearns v. Foote, 20 Pick. 422.

¹² Pierce v. Pierce, 17 Ind. App. 107, 46 N. E. 480.

¹³ Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112; Haviland v. Halstead, 34 N. Y. 643.

¹⁴ Beebe v. Johnson, 19 Wend. 500.

theless it may be subjectively impossible for many persons. If one thus promises, the promisee may reasonably suppose capacity exists. But a promise to touch the sky is evidently impossible in its nature as would be a stipulation by the promisor to convey his own property to himself."¹⁵

(d) The promises must be concurrent, that is, they must become obligatory at the same time; otherwise each is of no legal value at the time it is made and neither will support the other.¹⁶

(e) The promise must impose a legal liability on the person making it. At common law a married woman's promise, being void, would not constitute a legal consideration.¹⁷ The liability, however, need not be perfect. If the promise is merely voidable, as for instance an infant's promise, it is a sufficient consideration.¹⁸ The same is true of a promise which is valid but unenforceable, as for instance an oral promise requiring written proof under the statute of frauds.¹⁹ In other words mutuality of agreement may exist and mutuality of evidence or of remedy be absent.²⁰

§ 104. *Mutuality Required.*

Both parties bound to perform

There are cases where a definite offer is made to an ascertained person and the offeree accepts, but because he has really promised nothing a consideration is not present and the

¹⁵ Ashley, Contr., § 47.

¹⁶ Livingston v. Rogers, 1 Caines, 583; Tucker v. Woods, 12 Johns. 190, 7 Am. Dec. 305; James v. Fulcrod, 5 Tex. 512, 55 Am. Dec. 743; Flanders v. Wood, 83 Tex. 277, 18 S. W. 572.

¹⁷ Shaver v. Bear River, etc., Water, etc., Co., 10 Cal. 396; Warner v. Crouch, 14 Allen 163.

¹⁸ Chicago, etc., R. Co. v. Lammert, 19 Ill. App. 135; Willard v. Stone, 7 Cow. 22, 17 Am. Dec. 496.

¹⁹ Getchell v. Jewett, 4 Me. 350; Wilkinson v. Heavenrich, 58 Mich. 574, 26 N. W. 139, 55 Am. Rep. 708; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576.

²⁰ Robinson Consol. Min. Co. v. Johnson, 13 Colo. 258, 22 Pac. 459.

agreement is said to fail for want of *mutuality*.¹ An example of this is presented where A offers to supply B with such goods of a certain kind as he may desire or choose to order during a certain time at a certain price and B accepts that offer. Here B's acceptance is not a consideration, for he has promised nothing,² and A is not bound, his offer being still a mere offer which may be accepted by B giving an order for a definite quantity of the goods before it is actually withdrawn by A³ or expires by efflux of time.⁴

¹ 9 Cyc. 327, 13 C. J. 331. *Smythe v. Greacen*, 91 N. Y. (Supp.) 451; *Steinwender Co. v. Guenther Co.*, 80 S. W. 1170 (Ky.); *Vogel v. Pekoc*, 157 Ill. 339, 42 N. E. 386; *Steffen v. R. Co.*, 156 Mo. 322; *Mason v. Terrell*, 3 Sc. App. 348, 60 S. E. 4; *Landon v. Ct.*, etc., 269 Fed. 423; *Power Co. v. Kearney*, 274 Fed. 253; *Steel Co. v. Iron Co.*, 278 Fed. 50.

² 9 Cyc. 329, 13 C. J. 332. *Columbus Wire Co. v. Freeman Wire Co.*, 71 Fed. 364; *Hoffman v. Maffiolo*, 104 Wis. 630, 80 N. W. 1032; *Thayer v. Burchard*, 99 Mass. 508; *Wells v. R. Co.*, 30 Wis. 605; *Barrow S. C. Co. v. R. Co.*, 131 N. Y. 24, 31 N. E. 261; *Stensgard v. Smith*, 43 Minn. 11, 44 N. W. 669; *American Cotton Oil Co. v. Kirk*, 68 Fed. 792; *Railroad Co. v. Mitchell*, 38 Tex. 85; *Baltimore, etc., R. Co. v. Potomac R. Co.*, 51 Md. 32, 34 Am. Rep. 316; *Hickey v. O'Brien*, 123 Mich. 611, 21 N. W. 241; *Dennis v. Slyfield*, 117 Fed. 474; *Mallett v. Watkins*, 132 Ga. 700; 131 Am. State Rep. 226; 64 S. E. 999.

³ *Great Western R. Co. v. Witham*, L. R. 9 C. P. 16; *Holtz v. Schmidt*, 59 N. Y. 253; *Willetts v. Ins. Co.*, 45 N. Y. 45; *L'Amoureux v. Gould*, 7 N. Y. 349; *Kelly v. Ybanu*, 3 Cal. 147. In *Cooper v. Lansing Wheel Co.*, 94 Mich. 272, 54 N. W. 39, it was held that the offer of a manufacturer to deliver to plaintiff all the goods of a specified class at specified prices that plaintiff may need during the season, is a mere offer by the manufacturer to furnish the goods, which he has a right to withdraw at any time before it is acted on, even though accepted by plaintiff; but after he has filled an order at the prices specified, and has thus had the benefit of a sale, the entire contract becomes valid and binding and he can not thereafter decline to fill further orders. This decision is clearly wrong on both points. On the first, because we have seen that the promise to buy all the wheels he needed limited the plaintiff's freedom of choice, and was a good consideration for the promise; on the second, because if it was simply an offer, the order for a certain quantity of the goods was a contract to deliver the quantity ordered, and not all that the plaintiff might order in the future. See also *Philadelphia Baseball Co. v. Lajoie*, 51 Atl. 973 (Pa.).

In *Crane v. Crane Co.*, 105 Fed. 869, the court distinguishes between a contract to furnish another with such supplies as may

But where the acceptance does really impose an obligation on the acceptor, then a consideration is present and a binding contract results. And this is so wherever the acceptor's freedom of action is in any way limited.⁵ It is *not* limited at all where he simply assents to the seller's offer to sell him all the goods he may order or "desire" during a certain time, for he has not promised to order any, nor is he bound to do so. But it *is* limited where the offer is to supply him with all the goods of a particular kind which he may "require," or which he may need during a certain time, for here, though it may be

be needed during a specified period of time for some certain business or manufacture, or with such commodities as the purchaser has already contracted to furnish to others, the quantity in such cases being capable of at least approximate estimation when the contract is made, and an agreement by a wholesale dealer to supply a retailer during a certain time, at stated prices, with so much of a commodity as the purchaser may require for his trade. The former, in the opinion of the court, is good; but the latter is not, for the reason that it leaves it practically optional with the purchaser to increase or diminish his orders with the rise or fall of prices, as may be most to his advantage and the corresponding disadvantage of the seller. This reasoning is hardly satisfactory. The agreement may have been an improvident agreement, but that does not show that it was not a binding contract. If the promise to furnish at a fixed price so much of a commodity as the purchaser might order in a given time had been under seal, the promise would have been just as improvident, but it would have been binding. Not being under seal, the only question then can be, was there a consideration for it? Can it be denied that the counter promise to take, from the promisor within a certain specified time, all of that commodity which the purchaser might buy is a good consideration? If I agree to buy all of the articles of a certain kind that I may purchase within a year from X, is that not the same thing as saying that within that time I agree not to purchase any such articles from any living being save X? If I bought such articles from anyone but X, would not that be a breach of my promise to buy all articles of that kind within the time from X? Is not a promise, within a given time not to buy a certain article from A or B, and a fortiori, from no one but X, a perfectly good consideration for any lawful counter promise?

⁴ Chicago, etc., R. Co. v. Dane, 43 N. Y. 240.

⁵ Mail Pub. Co. v. Marks, 101 N. W. 4581 (Ia.); McKill v. R. Co., 186 Fed. 39, 109 C. C. A. 141; Jenkins Co. v. Anaheim Co., 247 Fed. 958; Jones v. Kellog Co., 193 Ill. App. 9; Gulf Ref. Co. v. Brown-Lloyd Co., 167 S. W. 162 (Tex.).

that he will neither need nor require any, yet if he does he has bound himself to buy them of the proposer, and has hence parted with his right to buy them from whom he pleases. In an Illinois case a corporation accepted an offer to sell it all the pig iron of a certain quality *which it would need, use or consume in its business during the coming year*, and it was held that this was a valid contract, the court saying:

“It cannot be said that the appellee was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so appellant might have maintained an action for breach of the contract.”⁶

And the same conclusion was reached where a hotel keeper accepted an offer to supply him with all the ice he might require in his ice business,⁷ for he could not, said the court; dispense entirely with the use of ice in his hotel. So of a contract for the entire output of a plant for a certain period, although it does not impose upon the seller the obligation of operating his plant.⁸ The buyer's obligation is to receive and pay for all the goods actually made by the seller and the sellers' obligation is to deliver all that are made in his plant.⁹

⁶ National Furnace Co. v. Keystone Co., 110 Ill. 427; Excelsior Wrapper Co. v. Messenger, 93 N. W. 459 (Wis.); Peterson v. Chan, 91 N. W. 687 (Wis.).

⁷ Smith v. Moore, 20 La. Ann. 229 and see Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241; Contra, Campbell v. Lambert, 36 La. Ann. 35. In a Minnesota case (Bailey v. Austrain, 19 Minn. 535) the court reasoned that, as the acceptor might go out of business when he pleased, there was no engagement on his part to “want” any of the goods offered, a plainly erroneous view for the acceptor did at least part with his right to buy goods of persons other than the offerer. This is enough, and it is not necessary to require in addition to this a warranty that he will remain in the business for any length of time. See Ames-Brooks Co. v. Aetna Ins. Co., 83 Minn. 346, 350, 86 N. W. Rep. 344; Drake v. Norse, 52 Iowa 417. A contract to furnish all that the purchaser may “require” does not oblige the seller to fill an order just before the expiration of the term, for a speculative purpose on a rising market. Dowd v. Hercules Powder Co., 181 Pac. 767 (Colo.).

⁸ Thomas Co. v. Gray, 94 Ark. 9; Hadden v. Dimick, 147 Mo. App. 390, 126 S. W. 532.

⁹ Kenan v. Home Fertilizer Co., 79 South. 367. As to the construc-

§ 105. *Subscription Papers.*

The case of subscriptions to carry out some public or other object in which the subscribers are interested is one not free from difficulty and three different views in regard thereto are held by the courts.

(a) In some states the promises of the different subscribers mutually support each other and the beneficiary may sue on the promise as one made for his special benefit.¹ Thus where A and B and others sign a paper agreeing to give certain sums for the erection of a church or the maintenance of a charity or the like, the paper is construed as a promise by A to pay the amount in consideration of B promising to pay the sum he subscribes and *vice versa*, and the object of the donation is allowed to sue on these mutual promises.

(b) In others the view is that the person to whom the subscription is made impliedly promises to appropriate the funds subscribed in conformity with the terms and effect of the subscription, and that this implied promise is a sufficient consideration in the absence of any other to support the promise of the subscriber.²

(c) The prevailing view, however, is that a subscription like any other promise requires a consideration to support it

tion of a contract of sale of all the purchaser shall require see note to *Diamond Alkali Co. v. Aetna Explosives Co.*, 264 Pa. St. 304; 107 Atl. 711, in 7 A. L. R. 498, and as to the sale of a season's output see note to *Allen v. Wolf River Co.*, 169 Wis. 253, 172 N. W. 158, in 9 A. L. R. 276.

¹ *Christian College v. Hendley*, 49 Cal. 347; *Allen v. Duffie*, 43 Mich. 1, 4 N. W. 427; *Armann v. Buel*, 40 Neb. 803, 59 N. W. 515; *Osborn v. Crosby*, 63 N. H. 583, 3 Atl. 429; *Irwin v. Lombard University*, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. Rep. 727; *Lathrop v. Knapp*, 27 Wis. 214.

² *North Ecclesiastical Soc. v. Matson*, 36 Conn. 26; *Illipolis M. E. Church v. Garvey*, 53 Ill. 401, 5 Am. Rep. 51; *McDonald v. Gray*, 11 Iowa 508, 79 Am. Dec. 509; *Collier v. Baptist Education Soc.*, 8 B. Mon. 68; *Maine Cent. Institute v. Haskell*, 73 Me. 140; *In re Helfstein*, 77 Pa. St. 328, 18 Am. Rep. 449; *Cooper v. McCrimmin*, 33 Tex. 383, 7 Am. Rep. 268; *Galt v. Swain*, 9 Gratt. 633, 60 Am. Dec. 311.

either of profit to the party promising or of loss to the other party, and that it is only where some obligation is incurred or labor or money expended on the faith of it that the subscriber is bound, up to which time the subscription may be revoked by the subscriber; but it becomes binding as soon as a consideration is furnished by incurring an obligation or expending labor or money on the faith of it.³ Thus in a Massachusetts case it is said:

“In every case, in which this court has sustained an action upon a promise of this description, the promisee’s acceptance of the defendant’s promise was shown, either by express vote or contract, assuming a liability or obligation, legal or equitable, or else by some unequivocal act, such as advancing or expending money, or erecting a building in accordance with the terms of the contract, and upon the faith of the defendant’s promise.”⁴

Subscriptions for a business as distinguished from a charitable purpose have been interpreted more liberally for the promisee, as there is usually in such cases some special consideration moving to the subscriber.⁵

§ 106. *Mutuality May Be Implied or Be Subsequently Present.*

Although on its face, the agreement may be binding on one party only, yet if the intention is clear that a mutual obliga-

³ *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 29 N. E. 1044; *Des Moines University v. Livingston*, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42; *Machias Hotel Co. v. Coyle*, 35 Me. 405, 58 Am. Dec. 712; *Sherwin v. Fletcher*, 168 Mass. 413, 47 N. E. 197; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164, 47 N. W. 652; *Pitt v. Gentle*, 49 Mo. 74; *Kansas City School Dist. v. Sheidley*, 138 Mo. 672, 40 S. W. 656; *McClanahan v. Payne*, 86 Mo. App. 284; *Twenty-third St. Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177; *Albany Presb. Church v. Cooper*, 112 N. Y. 517, 20 N. E. 352.

⁴ *College Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286.

⁵ *Martin v. Meles*, 179 Mass. 114; *Davis v. Campbell*, 93 Ia. 524.

tion should be assumed, the law will imply the promise.¹ In *Butler v. Thompson*,² the written memorandum of an agreement signed by the agents of both parties read as follows: "Sold for Messrs. B & Co. to Messrs. T & Co." a certain quantity of iron. It was objected that there was no agreement, as T & Co. had not agreed to buy the iron. But the court said:

"There can be no sale unless there is a purchase, as there can be no purchase unless there is a sale. When therefore the parties mutually certify and declare in writing that B & Co. have sold a certain amount of iron to T & Co. at a price named, there is included therein a certificate and declaration that T & Co. have bought the iron at that price."

A want of mutuality in the beginning may be cured by the other party subsequently binding himself also by promise or act. Thus if A promise B to pay him a sum of money if he will do a particular act or make a particular promise and B does the act or makes the promise, A's promise thereupon becomes binding. In the intermediate time the obligation of the promise is suspended, for until the performance of the condition of the promise there is no consideration, and the promise is *nudum pactum*; but on the performance of the condition by the promisee it is clothed with a valid consideration which relates back to the promise, and it then becomes obligatory.³

¹ *Miller v. Weld County*, 67 Pac. 347 (Colo.); *Bangor Furnace Co. v. Magill*, 108 Ill. 656; *Newmarket Mfg. Co. v. Coon*, 150 Mass. 566, 23 N. E. 380; *Minneapolis Mill Co. v. Goodnow*, 40 Minn. 497, 42 N. W. 356; *Lewis v. Atlas Mut. L. Ins. Co.*, 61 Mo. 534; *Mississippi River Logging v. Robinson*, 69 Fed. 773; *Dunaway v. Puryear*, 276 Fed. 209.

² 92 U. S. 412.

³ Ante, § 14; *Willeys v. Ins. Co.*, 45 N. Y. 45, 6 Am. Rep. 31. So an agreement founded on a consideration is not invalid for want of mutuality because one party has an option while the other has not. *Brown v. Ronisavell*, 78 Ill. 589; *Penn Co. v. Dolan*, 6 Ind. (App.) 109, 32 N. E. 303; *Staples v. O'Neal*, 64 Minn. 27, 65 N. W. 1083; *Williams v. Tiedeman*, 6 Mo. (App.) 269.

§ 107. *Promise to Do What Promisor Already Bound to Do.*

A promise to do or the doing what the promisor is already bound to do cannot be a consideration, for if one gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal.¹ This obligation may arise from (a) law or (b) contract.

(a) A public officer is required by law to perform his duties for his salary or other stated compensation. Therefore a promise to pay him more than this is founded on no other consideration than his promise to do or his actually doing what he is in duty bound to do.² A reward cannot be claimed by an officer whose duty it was to do what the offer requested to be done.³ The same principle has been held to apply to a promise to pay a witness more than his legal fees;⁴ to a promise to pay a common carrier greater compensation than it is entitled to charge;⁵ and to a promise to a wife in consideration of her performing, or promising to perform, her marital duties.⁶ So a promise to pay another for restoring to him property to which he is legally entitled is founded on no con-

¹ 9 Cyc. 347, 13 C. J. 351; *Ellison v. Jackson Co.*, 12 Cal. 542; *Warren v. Hodge*, 121 Mass. 126; *Ayers v. R. Co.*, 52 Iowa 478, 4 N. W. 522; *McDonald v. Nielson*, 2 Cow. 139, 14 Am. Dec. 431; *Crossman v. Wohleben*, 90 Ill. 537; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Tucker v. Bartle*, 85 Mo. 114; *Bush v. Rawlins*, 89 Ga. 117, 14 S. E. 886; *Sherwin v. Brigham*, 39 Ohio St. 137; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171; *Great West. R. Co. v. Sutton*, L. R. 4 H. L. 226; *Hillman v. Young*, 64 Or. 73, 129 Pac. 124; *Creamery Package Co. v. Russell*, 84 Vt. 80, 78 Atl. 718.

² *Smith v. Whildin*, 10 Pa. St. 39, 49 Am. Dec. 572; *Trundle v. Riley*, 17 B. Mon. 396; *Lucas v. Allen*, 80 Ky. 681; *Mitchell v. Vance*, 5 T. B. Mon. 528, 17 Am. Dec. 96; *Warner v. Grace*, 14 Minn. 487; *Padden v. Tronon*, 45 Wis. 126; *Temple v. Brooks*, 151 N. Y. S. 490.

³ *St. Louis. etc., R. Co. v. Grafton*, 51 Ark. 504, 11 S. W. 702; *Lees v. Colgan*, 120 Cal. 262, 52 Pac. 502; in re *Russell*, 51 Conn. 577, 50 Am. Rep. 55; *Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1.

⁴ *Dodge v. Stiles*, 26 Conn. 463; *Sweany v. Hunter*, 5 N. C. 181; *Collins v. Godefroy*, 1 B. & Ad. 950, 1 Dowl. P. C. 326.

⁵ *Ashmole v. Wainwright*, 2 Q. B. 837, 2 G. & D. 217; *Parker v. Great Western R. Co.*, 7 M. & G. 253, 8 Jur. 194.

⁶ *Miller v. Miller*, 78 Iowa 177, 35 N. W. Rep. 464, 42 N. W. 641, 16 Am. St. Rep. 421.

sideration,⁷ and giving a person an opportunity to examine his own books has been held to be no consideration to support a promise made by him.⁸

(b) A promise to carry out a subsisting contract with another or the performance of such contractual duty is clearly no consideration, as the party is doing no more than he was already obliged to do and hence has sustained no detriment nor has the other party obtained any benefit.⁹ In *Lingenfelder v. Wainwright Brewing Co.*,¹⁰ an architect engaged in erecting a brewery for the defendants, having discovered that the contract for the refrigerating plant had been awarded to a rival company to the one of which he was president, took away his men and plans and refused to proceed. The brewing company thereupon, being in great haste to have the building completed, promised him a commission of five per cent on the cost of the refrigerating plant to induce him to resume work, which he did. It was held that this promise was void for want of consideration.

“When a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as *nudum pactum*, and will not lend its process to aid in the wrong.”

Notwithstanding the multitude of decisions sustaining this doctrine, some courts have held that a party to a contract has the right to elect whether he will perform the contract or

⁷ *Worthen v. Thompson*, 54 Ark. 151, 15 S. W. Rep. 192; *Killough v. Payne*, 52 Ark. 174, 12 S. W. 327; *Tolhurst v. Powers*, 133 N. Y. 460, 31 N. E. Rep. 326; *Fink v. Smith*, 170 Pa. St. 124, 32 Atl. 566, 50 Am. St. 750.

⁸ *Mass. Mut. Ins. Co. v. Green*, 70 N. E. 202 (Mass.).

⁹ *Johnson v. Seller*, 33 Ala. 265; *Bush v. Rawlins*, 89 Ga. 117, 14 S. E. 886; *Reynolds v. Nugent*, 25 Ind. 328; *Ayres v. Chicago, etc.*, R. Co., 52 Iowa 478, 3 N. W. 522; *Schuler v. Myton*, 48 Kan. 282, 29 Pac. 163; *Westcott v. Mitchell*, 95 Me. 377, 50 Atl. 21; *Ferguson v. Harris*, 39 S. C. 323, 17 S. E. 782, 39 Am. St. Rep. 731; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171.

¹⁰ 103 Mo. 578, 15 S. W. Rep. 844.

abandon it and pay damages, and that his giving up of this right of election furnishes a consideration for the new promise.¹¹ Other courts hold that the making of the new contract is conclusive evidence that the parties have mutually agreed to rescind the old one,¹² and that the new one must stand as if no previous one had been made.¹³ In one state the peculiar doctrine is announced that the new agreement is independent of the old one, that both contracts are therefore in force, and that the party refusing to perform may sue on the other's promise contained in the second, and the other may sue on the former's promise contained in the first,¹⁴ while in another it is held that where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulty in the performance of the contract, which was not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated, and the opposite party promises him extra pay or benefits if he will complete his contract, and he does so, the promise to pay is supported by a sufficient consideration.¹⁵

Neither is a promise to perform a pre-existing contract with a third person a good consideration, according to the weight of authority in this country,¹⁶ though in England¹⁷ and a few states¹⁸ there are conflicting decisions.

¹¹ *Monroe v. Perkins*, 9 Pick. 298; *Connelly v. Devoe*, 37 Conn. 570.

¹² As to discharge by agreement, see post.

¹³ *Coyner v. Lynde*, 10 Ind. 282; *Stewart v. Keteltas*, 36 N. Y. 388. See the criticism of this doctrine in *King v. Duluth, etc.*, R. Co., 61 Minn. 482, 63 N. W. 1105.

¹⁴ *Endriss v. Belle Isle Ice Co.*, 49 Mich. 279, 13 N. W. 590. See the criticism of this case in *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, 15 S. W. Rep. 844.

¹⁵ *King v. Duluth, etc.*, R. Co., 61 Minn. 482, 63 N. W. 487; *Michaud v. MacGregor*, 61 Minn. 198, 63 N. W. 479; *Meech v. Buffalo*, 29 N. Y. 198; *Cooke v. Murphy*, 70 Ill. 96.

¹⁶ *Johnson v. Seller*, 33 Ala. 265; *Ellison v. Jackson Water Co.*, 12 Cal. 542; *Havana Press Drill Co. v. Ashurst*, 148 Ill. 115, 35 N. E. 873; *Brownlee v. Lowe*, 117 Ind. 420, 20 N. E. 301; *Schuler v. Myton*, 48 Kan. 282, 29 Pac. 163; *Arend v. Smith*, 151 N. Y. 502, 45 N. E. 872; *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224; *Hanks*

§ 108. *Promise Beyond Legal Duty or Contractual Obligation.*

The consideration will be real and sufficient if the promisee does or promises more than his legal duty requires him to perform.¹ Thus a promise to pay a jailer for extraordinary attention and services to a prisoner in his sickness, which the law did not make it the duty of the jailer to perform,² and

v. Barron, 95 Tenn. 275, 32 S. W. 195; Kenigsberger v. Wingate, 31 Tex. 42, 98 Am. Dec. 512; Davenport v. First Cong. Soc., 33 Wis. 387. A. promised B. who was under contract with C. to ride his C.'s horse in a certain race that he would pay him a sum of money if won the race. *Held*, without consideration. McDeavit v. Stokes, 174 Ky. 515, 192 S. W. 681, and see L. R. A., 1917, D. 1104. J. agreed with School trustees to teach in their school, and to bring his wife with him as a teacher. He did not do so and then S. promised to pay him \$2,500 if he would. *Held* that there was no consideration for the second promise. Johnson v. Seller, 33 Ala. 265, H. & W. 225.

¹⁷ S. promised to deliver to P. a cargo of coal, then on board S.'s ship, and P. promised to unload it at a certain speed. S. at the time had agreed to deliver the coal to A. or order and A. had made an order in favor of P. The court held that contract good, saying that there might have been some dispute as to P.'s right to the coal. Scotson v. Pegg, 6 H. & N. 295. S. had promised to marry the defendant's niece, and the uncle afterwards promised him an annuity if he did so. The promise was held binding by a divided court. Shadwell v. Shadwell, 30 L. J. C. P. 145.

¹⁸ In Massachusetts, it is said that when one who is unwilling or hesitating to go on and perform a contract which proves a hard one for him, is requested to do so by a third person who is interested in such performance, though having no legal way of compelling it, or of recovering damages for a breach, and who accordingly makes an independent promise to pay a sum of money for such performance, the reasons for holding him bound to such payment are stronger than where an additional sum is promised by the party to the original contract, and that therefore if A. has refused or hesitated to perform an agreement with B., and is requested to do so by C., who will derive a benefit from such performance, and who promises to pay him a certain sum therefor, and A. thereupon undertakes to do it, the performance by A. of his agreement is a good consideration for C.'s promise. Abbott v. Doane, 163 Mass. 433. And see DeCicco v. Schweizer, 117 N. E. 807 (N. Y.); Hazlewood v. Gas Co., 268 Fed. 829.

¹ Studley v. Ballard, 169 Mass. 295, 47 N. E. 1000; Gregg v. Pierce, 53 Barb. 387; Davis v. Munson, 43 Vt. 675, 5 Am. Rep. 315; Harris v. Moore, 70 Cal. 502, 11 Pac. 780; McCandless v. Allegheny Steel Co., 152 Pa. St. 139, 25 Atl. 579; Texas Cotton Press Co. v. Ins. Co., 54 Tex. 319, 38 Am. Rep. 627; England v. Davidson, 11 Ad. & Ell. 856.

² Trundle v. Riley, 17 B. Mon. 396.

a promise of a reward to a fireman for recovering at the peril of his life a body from a burning building have been held binding.³

So the consideration will be sufficient if it is the doing or promising to do something which was not either expressly or impliedly a part of the subsisting contract.⁴ In an English case a seaman had signed articles of agreement to help navigate a vessel to England from the Falkland Isles. The vessel proving to be unseaworthy, a promise of extra reward to induce him to abide by his contract was held to be binding, on the ground that the seaman's contract contained an implied condition that the ship should be seaworthy.⁵

§ 109. *Payment of Part of Debt.*

The payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt, for it is doing no more than the debtor is already bound to do, and it is no consideration for a promise, express or implied, to forego the residue.¹ A for example owes B \$100. An acceptance by B of \$75 in discharge of the debt or a promise by B to A that he will take \$75 in full of all claims is not binding on B, who may sue for the \$25 unpaid in the first case or for the full sum of \$100 in the second.² This rule of the common law while generally adhered to in the American courts is regarded as harsh in its application to particular facts, the courts being only too ready to seize on any circumstance which can take the case out of

³ Reif v. Page, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731.

⁴ Royal v. Lindsay, 15 Kan. 591; Brownlee v. Lowe, 117 Ind. 420, 20 N. E. 801; Corrigan v. Detch, 61 Mo. 290.

⁵ Turner v. Owen, 3 F. & F. 176.

¹ 9 Cyc. 354, 13 C. J. 357; Cumber v. Wane, 1 Strange 426; Sherman v. Pacific Coast Co., 159 Pac. 333, and see note, L. R. A., 1917, A. 716.

² So of a promise by a creditor to credit his debtor double the amount of every payment he makes. Klausman v. Schoenlaw, 32 Mo. (App.) 357, or a promise in consideration of the maker paying a matured note, that he, the creditor, will extend another note not yet due. Wolz v. Parker, 134 Mo. 450, 35 S. W. 1149.

the principle upon which it rests.³ Therefore numerous exceptions to the rule are to be found, and so numerous are they as to make the rule itself more shadow than substance. The exceptions are:

(a) Where the debtor does something different from what the creditor is entitled to demand. Thus where A owes B \$100 the giving by A of a negotiable instrument for the debt, or property instead of money, as "the gift of a horse, a hawk or a robe. For it shall be intended that a horse, a hawk or a robe might be more beneficial to the plaintiff than money in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction."⁴ So the agreement is sufficiently supported, where it is made before the maturity of the debt;⁵ or at a different place than the original debt was made payable, or was in law payable;⁶ or the creditor receives some additional advantage.⁷

(b) Where the contract is wholly executory, if the liabilities of both parties are as yet unfulfilled, it can be discharged by mutual consent, the acquittance of each from the other's claims being the consideration for the promise of each to waive his own.⁸

(c) Where the agreement to forego the residue is by a writing under seal, for here consideration is presumed.⁹

(d) Where the creditor on receipt of part of the debt makes

³ It is changed by statute in several states.

⁴ *Cumber v. Wane*, 1 Strange, 426; *Jaffray v. Davis*, 124 N. Y. 187; *Neal v. Handley*, 116 Ill. 418, 56 Am. Rep. 784, where it was held that the receipt of \$100 and a cow in full of a judgment for \$200 is a satisfaction of the judgment.

⁵ *Bowker v. Childs*, 3 Allen 434.

⁶ *First Nat. Bk. v. Shook*, 100 Tenn. 436, 45 S. W. 330; *Pinnel's Case*, 5 Coke, 117a; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136.

⁷ *Jaffray v. Davis*, 124 N. Y. 164; *Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. Rep. 415.

⁸ *Lattimore v. Harsen*, 14 Johns. 330; *Rollins v. Marsh*, 128 Mass. 116; *Bishop v. Busse*, 69 Ill. 403; *Cooke v. Murphy*, 70 Ill. 96; *King v. Julet*, 7 M. & W. 55.

⁹ See ante, § 70.

the debtor a gift of the residue, for an executed gift is irrevocable by the donor.¹⁰

(e) Where the claim is unliquidated and its amount is disputed, here the law will not disturb the settlement made by the parties simply because it may afterwards appear that the creditor received less than he was legally entitled to.¹¹ But an unliquidated claim is not discharged by the acceptance in full satisfaction of a sum less than the debtor admits to be due.¹²

§ 109a. *Compositions with Creditors.*

At first blush a composition with creditors might seem to fall under the rule just stated, inasmuch as each creditor agrees to accept a less sum than due him in satisfaction of his claim. But in these cases, the promise to pay or the payment of a part of the debt is not the consideration upon which the creditor gives up the residue, but the giving up a part of their claims by the other creditors, parties to the agreement, is the consideration for each one giving up a part and accepting the composition in discharge of his whole debt.¹

§ 110. *Forbearance to Sue.*

It has been seen that to agree to give up a legal right is a consideration.¹ A frequent illustration of this principle occurs where one agrees not to prosecute a claim which he has against another and it is well settled that the actual giving up or the

¹⁰ Bishop Contr. § 50; McKenzie v. Harrison, 120 N. Y. 260, 17 Am. St. Rep. 638.

¹¹ Wilkinson v. Byers, 1 Ad. & E. 106; Chicago, etc., R. Co. v. Clark, 92 Fed. 975; Pohlman Coal Co. v. St. Louis, 145 Mo. 651; Baird v. U. S., 96 U. S. 430; Pitkin v. Noyes, 48 N. H. 294, 2 Am. Rep. 218; Ostrander v. Scott, 161 Ill. 339.

¹² Huff v. Logan, 60 S. W. 483 (Ky.).

¹ Steinman v. Magnus, 11 East 390; Farrington v. Hodgdon, 119 Mass. 453; Robert v. Barnum, 80 Ky. 28; White v. Kuntz, 107 N. Y. 518.

¹ Ante, § 99.

promise to give up the right to sue another is a sufficient consideration to support an agreement.²

The question is, when has one a *right to sue* and here we find three different views:

(a) One view is that one has a right to sue only when he has a good cause of action;³ and under this view forbearance to sue upon a claim on which the party could not have succeeded if he had sued will not support a promise. This was held in some early English cases⁴ now overruled and is laid down in a few American decisions.⁵

(b) Another view is that one has a right to sue who honestly believes that he has a good cause of action, even although it is not an enforceable claim or even reasonably doubtful.

² 9 Cyc. 338, 13 C. J. 342.

³ This view is probably historically correct for the party who loses a suit must pay all the costs and in early English law he was fined in addition.

⁴ Barber v. Fox, 2 Saund. 136; Wade v. Simeon, 2 C. B. 548, 3 D. & L. 587, where it is said: "Detrimental to the plaintiff it cannot be, if he has no cause of action; and beneficial to the defendant it cannot be; for in contemplation of law, the defense upon such an admitted state of facts must be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain." But this doctrine is overruled in the later case of Callisher v. Bichoffsheim, L. R. 5 Q. B. 449. This seems to be still true of Irish law. "In re Williamson, 2 Ir. Rep. 125 (1904), a bankrupt had brought an action against a cycle company for negligence in the construction of his bicycle, whereby he had fallen and sustained injuries. He obtained a verdict, but it was eventually set aside by the Court of Appeal and judgment entered for the defendants. He paid practically all he had (some \$750—he was a clerk) to his own solicitors on account of costs, but this still left \$1,000 due them, for which they recovered judgment. The cycle company taxed their costs at over \$2,000. The Court held that he was not entitled to his certificate under a statute permitting it to grant a discharge unless his failure to pay was due to causes 'for which the bankrupt could not be held responsible.' It is, no doubt, hard that a man who brings an action, being doubtless advised that he can succeed, should be saddled with a continuing bankruptcy in consequence. But to hold otherwise would remove one of the few checks upon reckless litigation by a pauper plaintiff." 29 Law Mag. 363.

⁵ Palfrey v. R. Co., 4 Allen 55; Foster v. Metts, 55 Miss. 77, 30 Am. Rep. 509; Price v. Nat. Bk., 62 Kan. 243, 64 Pac. 639, citing with approval the overruled English case of Wade v. Simeon, supra.

This is the modern English doctrine, laid down by Cockburn, C. J., in a well known case in these words:

“If a man *bona fide* believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to do so will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and instead of being annoyed with an action he escapes from the vexations incident to it. It would be another matter if a person made a claim which he knew to be unfounded, and by a compromise obtained an advantage under it.”⁶

This view is followed in some American cases.⁷

(c) The better view and the one supported by the great weight of authority is that one has a right to sue where his claim is reasonably doubtful either in law or in fact; and therefore to forbear to prosecute a claim which is reasonably doubtful is a sufficient consideration.⁸

The compromise of a claim follows the same principle as

⁶ *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449.

⁷ *Ostrander v. Scott*, 161 Ill. 339; *Hayes v. Massachusetts Mut. L. Ins. Co.*, 125 Ill. 626, 18 N. E. 322; *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *Leeson v. Anderson*, 99 Mich. 247, 58 N. W. 72, 41 Am. St. 597; *Hansen v. Gaar*, 63 Minn. 94, 65 N. W. 254; *Grandin v. Grandin*, 49 N. J. L. 508, 9 Atl. 756, 60 Am. Rep. 642; *Wahl v. Barnum*, 116 N. Y. 87, 22 N. E. 280; *Hewett v. Currier*, 63 Wis. 386, 23 N. W. 884; *Fire Ins. Assoc. v. Wickham*, 141 U. S. 564. In this case it is said: “If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of a part will not be considered as a compromise, but will be treated as without consideration and void.” *Harriman* (Contracts, § 114) says of this: “The distinction between good faith (‘a bona fide dispute’) and reasonable conduct (‘no good reason to doubt’) seems here, as in many other cases, to be entirely overlooked. Yet such distinction is of the utmost importance, for honesty and reasonableness are by no means inseparable.”

⁸ 9 Cyc. 340, 13 C. J. 346; *Russell v. Wright*, 98 Ala. 652, 13 South. 594; *Parker v. Enslow*, 102 Ill. 272, 40 Am. Rep. 588; *U. S. Mortg. Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88; *Cline v. Templeton*, 78 Ky. 550; *Prout v. Pittsfield Fire Dist.*, 154 Mass. 450, 28 N. E. 679; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593; *Rinehart v.*

the forbearing to bring suit,⁹ though a distinction has been suggested.¹⁰

The promise of forbearance need not be a promise of *absolute forbearance*, nor even of forbearance for a *definite time*; where no time is mentioned, a reasonable time will be implied.¹¹ But there must be an actual contract to forbear. If the agreement leaves the creditor free to sue if he chooses, there is not a good consideration.¹²

§ 111. *Motive and Moral Obligation.*

Motive is not the same as consideration nor does it have the same legal effect. It has, however, sometimes figured as consideration in the form of a moral obligation to repay benefits received in the past. It is clear that the desire to repay or reward a benefactor is indistinguishable from a desire on the part of an executor to carry out the wishes of a deceased

Bills, 82 Mo. 534, 52 Am. Rep. 385; *Clark v. Turnbull*, 47 N. J. L. 265, 54 Am. Rep. 157; *Bellows v. Sowles*, 55 Vt. 391, 45 Am. Rep. 291.

⁹ *McDole v. Kingsley*, 163 Ill. 433, 45 N. E. 281; *Price v. Atchison First Nat. Bank*, 62 Kan. 743, 64 Pac. 639; *Foster v. Metts*, 55 Miss. 77, 30 Am. Rep. 504; *Good Fellows v. Campbell*, 17 R. I. 402, 22 Atl. 307; *Bellows v. Sowles*, 57 Vt. 164, 52 Am. Rep. 118; *Hewett v. Currier*, 63 Wis. 386, 23 N. W. Rep. 884.

¹⁰ "It would seem that a compromise of a doubtful claim (that is, doubtful as to whether there is any claim or doubtful as to the amount of the claim) should be distinguished from a forbearance to sue upon a claim of a definite amount. In forbearance the one forbearing simply postpones his suit; he does not agree to compromise on a smaller sum. In such a case it would seem that he must actually have a well-founded claim to forbear or the consideration is of no value. In compromise there is doubt, followed by mutual concession. The doubt may be as to whether there is any claim, and the plaintiff may agree to take less than the sum claimed and the defendant to pay something where he believes he owes nothing; or the doubt may be as to the amount due, and an amount somewhere between the two contended for may be agreed upon." *Anson Contr.* (8th Ed.), by Hufcut, page 99, note.

¹¹ 9 Cyc. 344, 13 C. J. 348; *Fish Min. Co. v. Reid*, 77 Pac. Rep. 245 (Colo.).

¹² *Manter v. Churchill*, 127 Mass. 31; *Strong v. Sheffield*, 144 N. Y. 392.

friend, or on the part of a father to pay the debts of his son. The mere satisfaction of such a desire, unaccompanied by any present or future benefit accruing to the promisor or any detriment to the promisee, cannot be regarded as of any value in the eye of the law.¹ The topic belongs to the discussion of past as distinguished from executed or present consideration, for past consideration is no consideration, and what the promisor gets in such a case is the satisfaction of motives of pride or gratitude. The question was settled in *Eastwood v. Kenyon*,² where Denman, C. J., said:

“The doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.”^a

Therefore a promise by a son to pay his father's debts,³ or by a father to pay his son's,⁴ or by a friend to another,⁵ or of an executor based on what he knew to be the desire of the testator,⁶ or of a husband to carry out what he believed to be the wishes of his deceased wife,⁷ or of a man to a woman whom he had seduced to pay her a certain sum of money in atonement for the injury,⁸ or by an invalid to her nurse to

¹ 9 Cyc. 356, 13 C. J. 356; *Thomas v. Thomas*, 2 Q. B. 851; *Cook v. Bradley*, 7 Conn. 57; *Mills v. Wyman*, 3 Pick. 207; *People v. Porter*, 287 Ill. 401, 123 N. E. 59; *McGuire v. Hughes*, 207 N. Y. 516, 101 N. E. 460. In a few early cases moral considerations were recognized, and in one or two States they are still. Some courts have held that a moral obligation is a good consideration when founded on benefits previously received from the promise. See the cases collected in 9 Cyc. 361. But both of these views are contrary to the weight of authority.

² 11 Ad. & Ell. 438.

^a *Anson Contr.* 80.

³ *McElven v. Sloan*, 56 Ga. 208; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Nixon v. Van Heze*, 5 N. J. (L.) 491, 8 Am. Dec. 619.

⁴ *Freeman v. Robinson*, 38 N. J. (L.) 383, 20 Am. Rep. 339; *Mills v. Wyman*, 3 Pick. 207; *Robinson v. McAfee*, 59 Mich. 375, 26 N. W. Rep. 643.

⁵ *Wright v. Threatt*, 146 Ga. 778, 92 S. E. 640.

⁶ *Thomas v. Thomas*, 2 Q. B. 581.

⁷ *Schnell v. Neel*, 17 Ind. 29, 79 Am. Dec. 453; *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227.

⁸ *Beaumont v. Reeve*, 8 Q. B. 483.

pay her more than the agreed wage on account of gratitude for her services,⁹ are without consideration and unenforceable. So where services are rendered to one person by another without his knowledge or request, or without any expectation of receiving compensation for them, a subsequent promise to pay for them is without consideration.¹⁰

Promises to pay debts barred by some law not affecting the real right, as debts barred by the statute of limitations, debts incurred by infants, debts of bankruptcy, are sometimes classed as exceptions to the above rule. But they properly fall under the head of past consideration.¹¹

§ 112. *Past Consideration.*

A past consideration will not support a promise for it confers no benefit on the promisor, and involves no detriment to the promisee in respect of his promise.¹ A past consideration is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive and not upon consideration.²

To this rule there are said to be several exceptions as follows:

(a) Where the consideration was given at the request of

⁹ *Maginnes v. Copeland*, 160 N. W. 50 (Ia.).

¹⁰ *Allen v. Bryson*, 67 Ia. 591, 56 Am. Rep. 358; *Osier v. Hobbs*, 33 Ark. 215; *Bartholomew v. Jackson*, 20 Johns. 28, 11 Am. Dec. 237.

¹¹ See post, § 112.

¹ Ante, § 98.

² 9 Cyc. 358, 13 C. J. 359; *Gooch v. Gooch*, 160 N. W. 333 ((Ia.); Same, 70 W. Va. 38, 73 S. E. 56; *Hevis v. Wheelock*, 140 N. Y. S. 581; *Peters v. Poro* (Vt.), 117 A. 244.

the promisor. This exception is supposed to have been first made in *Lampleigh v. Brathwait*,³ decided in 1615, where the plaintiff sued the defendant for £100 which the latter had promised to pay him for journeys and services he had rendered at his request. The court gave judgment for the plaintiff, saying :

“It was agreed that a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy was moved by a suit or request of the party that gives the assumpsit, it will bind; for the promise though it follows yet it is not naked but couples itself with the suit before and the merits of the party procured by that suit, which is the difference.”

But it is pointed out by an English writer of authority⁴ that this case did not decide that where the consideration was given at the request of the promisor the subsequent promise is supported by it, and a modern English case states the present law of England on the subject thus :

“It was assumed that the journeys which the plaintiff performed at the request of the defendant and the other services he rendered would have been sufficient to make any promise binding if it had been connected therewith in one contract; the peculiarity of the decision lies in connecting a subsequent promise with a prior consideration after it had been executed. Probably *at the present day*, such service on such a request would have raised a promise by implication to pay what it was worth; *and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount.*”⁵

This also represents the American rule at the present day⁶ except in those jurisdictions where the anomalous doctrine of

³ Hob. 105; 1 Smith L. Cas. 141.

⁴ Anson Contr., p. 98; *Wilkinson v. Oliveria*, 1 Bing, N. Cas. 490, 1 Scott 461; in re Casey (1892) 1 Ch. 104, 61 L. J. Ch. 61. See *Bradford v. Roulston*, 8 Ir. C. L. 468, an Irish case criticised by Anson, Contr., p. 98.

⁵ *Kennedy v. Broun*, 13 C. B. (N. S.) 677.

⁶ *Hicks v. Burhaus*, 10 Johns. 242; *Wilson v. Edmonds*, 24 N. H. 517.

moral consideration is adopted.⁷ The court in such cases allows the jury to imply a previous request from the fact that the service was beneficial to the promisor, when there is no evidence expressly negating the request.⁸ But if no promise could be implied from the request, as where the services were understood to be gratuitous, then a subsequent express promise is without consideration.⁹ And if the express promise is different from what the law would have implied it is not enforceable.¹⁰

(b) If a person incur a legal liability at the request of another, such liability is a sufficient consideration to support a promise by one at whose request it is incurred.¹¹

(c) A pre-existing liability is a good consideration for a new promise.¹² Therefore where a debtor gives additional security as a mortgage or a negotiable instrument or the like to his creditor, or a principal to his surety, on a pre-existing debt, without any new consideration, there is a sufficient consideration, for as said in one case:

“No case can be found in which a man’s own debt has been ruled to be an insufficient consideration between him and his creditor, for a mortgage or other security received by the latter from the debtor.”¹³

⁷ See ante, § 111.

⁸ O’Connor v. Beckwith, 41 Mich. 657, 8 N. W. Rep. 166; Hatch v. Purcell, 21 N. H. 544; Milliken v. Western Union Tel. Co., 110 N. Y. 403, 18 N. E. 251; Davidson v. Westchester Gas Light Co., 99 N. Y. 558, 2 N. E. 892; Paul v. Stackhouse, 38 Pa. St. 302; Silverthorn v. Wylie, 96 Wis. 69, 71 N. W. 107; Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100.

⁹ Osier v. Hobbs, 33 Ark. 213; Allen v. Bryson, 67 Ia. 591, 25 N. W. 820, 56 Am. Rep. 358; Moore v. Elmer, 180 Mass. 15, 61 N. E. 250; Bartholomew v. Jackson, 20 Johns 28, 11 Am. Dec. 237.

¹⁰ Bailey v. Bussing, 29 Conn. 1.

¹¹ Mound City Land, etc., Assoc. v. Slauson, 65 Cal. 425, 4 Pac. 396; Callahan v. Linthicum, 43 Md. 97, 20 Am. Rep. 106.

¹² Bailey v. Bussing, 29 Conn. 1; Duncan v. Miller, 64 Iowa 223, 20 N. W. 161; Skilling v. Bollman, 73 Mo. 665, 39 Am. 537; Haseltine v. Guild, 11 N. H. 390.

¹³ Turner v. McFee, 61 Ala. 468.

(d) It is laid down in a number of cases that where a person without authority voluntarily does something which another was legally bound to do, and the latter subsequently promises to recompense him therefor, he will be bound by his promise.¹⁴ This view, however, has been justly criticised.¹⁵ The correct principle on which such liability is founded is that where A renders services or pays money for B without any request or authority from B, B may afterward ratify A's act and by the law of agency¹⁶ B's ratification is equivalent to a previous request to A to perform the service or pay the money.¹⁷ The defendant's liability then must depend on the fact that the acts were done on his behalf and not on the fact that he was legally bound to do them.¹⁸

(e) Where a promise for a valuable consideration cannot be enforced against the will of the promisor, by reason of some rule or provision of law meant for his advantage, he may, subsequently, if of full capacity to contract, renounce the benefit of such rule or provision by renewing his original promise.¹⁹ A promise by a person of full age to pay a debt contracted during his minority is binding though made on no new consideration.²⁰ So is a promise to pay a debt barred

¹⁴ Gleason v. Dyke, 22 Pick. 390, 393; Doty v. Wilson, 14 Johns, 378, 382.

¹⁵ Harriman Contr., § 140; Anson Contr., 102.

¹⁶ See post, § 171.

¹⁷ Gleason v. Dyke, 22 Pick. 390; Doty v. Wilson, 14 Johns. 378. A few American cases appear to enforce the liability on the ground of quasi-contract, that is, on the ground that the defendant has been enriched at the expense of the plaintiff and ought to repay. See Curtis v. Parks, 55 Cal. 106.

¹⁸ Harriman Contr., § 140, citing Doty v. Wilson, supra: Gleason v. Dyke, supra.

¹⁹ Womach v. Womach, 8 Tex. 397, 58 Am. Dec. 119; Shepard v. Rogers, 7 R. I. 470, 84 Am. Dec. 573; Warren v. Whitney, 24 Me. 561, 41 Am. Dec. 406, 518.

²⁰ Williams v. Moor, 11 M. & W. 256; Reed v. Batchelder, 1 Metc. 559; Stern v. Freeman, 4 Met. (Ky.) 309.

by the statute of limitations,²¹ or after a discharge in bankruptcy.²² It is said in an English case:

“Where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it.”²³

The true theory, however, of promises of this kind is that they do not create new contracts but that they are merely waivers of a personal defense against existing contracts. Hence the action is properly brought on the original promise,²⁴ unless the subsequent promise is in the form of a nego-

²¹ Keener v. Crull, 19 Ill. 189; Carroll v. Forsyth, 69 Ill. 127; Walker v. Henry, 36 W. Va. 100, 14 S. E. 440.

²² St. John v. Stephenson, 90 Ill. 82; Katz v. Moessinger, 110 Ill. 372; Allen v. Ferguson, 18 Wall. 1; Wislizenus v. O'Fallon, 91 Mo. 184, 3 S. W. 837; Herrington v. Davit, 220 N. G. 162, 115 N. E. 476.

²³ Parke, B., in Earle v. Oliver, 2 Ex. 90.

Married Women.

A married woman's promise being void and not like an infant's, merely voidable, it is held in most of the states (except where a moral consideration will support a promise) that a promise made by a woman after the marriage is dissolved to pay debts made during coverture is not binding on her. Musick v. Dodson, 76 Mo. 624, 43 Am. Rep. 780.

Antecedent Illegal Agreement.

In *Flight v. Reed*, 1 H. & C. 703, bills of exchange were given by the defendant to the plaintiff to secure the repayment of money lent at usurious interest while the usury laws were in force. The bills were by those laws rendered void as between plaintiff and defendant. After the repeal of the usury laws the defendant renewed the bills, the consideration for renewal being the past loan, and it was held that he was liable upon them. This case must be considered as based on the idea that usury laws are merely for the protection of the debtor who may renounce the benefit of them—for it is a well-established principle that the repeal of a statute which makes a contract void does not validate a contract entered into while the statute was in force. *Ludlow v. Hardy*, 38 Mich. 690.

²⁴ See post, § 153. Infants.

tible instrument,²⁵ and the new promise simply operates as a *waiver* by the promisor of a defense which the law gives him against an action on the old promise.²⁶ This exception applies only where the former right of action has been extinguished by the act of the law and not where it is extinguished by the act of the parties;²⁷ and so if a creditor should voluntarily release his debtor from a debt, a subsequent promise by the debtor to pay the debt would be unenforceable.²⁸

§ 113. *Consideration Obtained by Fraud or Duress.*

Where by fraud or duress a person has obtained a benefit, he cannot set up this to show that he had made no previous request.¹ Thus where a man fraudulently representing himself to be the owner of land induced another to labor on it in expectation of becoming a joint owner, it was held that the latter, on discovering the fraud, might sue for and recover the value of his services.² And founded on this principle are two Missouri cases in one where a woman having discovered that her husband was already married was permitted to recover the value of her services while living with him,³ in another where a negro girl born and raised a slave having been kept by her master for years in utter ignorance of her emancipation and her right to her own labor, and worked for him believing she was obliged to and without any intention of ask-

²⁵ *Parker v. Cowan*, 1 Heisk. 518; *Wislizenus v. O'Fallon*, 91 Mo. 184, 3 S. W. 837.

²⁶ *Hunt v. Massey*, 5 B. & Ad. 902; *Way v. Sperry*, 6 Cush. 238, 241; *Marshall v. Tracy*, 74 Ill. 379; *Shepard v. Rhodes*, 7 R. I. 740.

²⁷ *Shepard v. Rhodes*, 7 R. I. 470, 84 Am. Dec. 871; *Stafford v. Bacon*, 1 Hill, 352, 37 Am. Dec. 366.

²⁸ *Valentine v. Foster*, 1 Metc. 520.

¹ *Peter v. Steel*, 3 Yeates 250; *Boardman v. Ward*, 40 Minn. 399, 12 Am. St. Rep. 749.

² *Richard v. Stanton*, 16 Wend. 25.

³ *Higgins v. Breen*, 9 Mo. 497; *Fox v. Martin*, 8 Mart. (La.) 94. But see *Contra, Cooper v. Cooper*, 147 Mass. 370, 17 N. E. Rep. 892; criticised by Keener (*Quasi Contracts*, p. 323); *Re Payne*, 65 Conn. 397, 32 Atl. Rep. 948.

ing for pay, was held entitled to recover for her services during these years.⁴

§ 114. *Failure of Consideration.*

Strictly speaking, as has been well pointed out, there can be no such thing as a failure of consideration. The promisor either receives the consideration he has bargained for or he does not. If he does not, then there is no enforceable agreement, for there is no consideration; and if he does receive the consideration how can it afterward fail? It may become less valuable or of no value at all, but that does not affect the agreement.¹ Where a note sold afterwards becomes of no value,² stock purchased becomes worthless,³ a patent becomes worthless because of improvements,⁴ or a house rented for a term is destroyed before the end of the term,⁵ the agreement is not affected. Failure of consideration is in fact simply want of consideration.⁶ It is laid down, however, in a number of cases that when the consideration for a promise wholly fails the promise is without consideration and unenforceable.⁷ This simply means that in a contract with an executory consideration, the execution of the consideration is a condition precedent to the liability on the promise, and the failure to execute the consideration discharges the promisor.

When there is a failure of a part of a lawful consideration

⁴ Hickam v. Hickam, 46 Mo. (App.) 496.

¹ Blackman v. Dowling, 63 Ala. 304; Smock v. Pierson, 68 Ind. 405, 34 Am. Rep. 269; Varney v. Bradford, 86 Me. 510, 30 Atl. 115; Byrne v. Cummings, 41 Miss. 192; Karl v. Maloney (Kan.), 205 P. 1037.

² Rice v. Grange, 131 N. Y. 149, 30 N. E. 46; Ward v. College (Wis.), 185 N. W. 635.

³ Gore v. Mason, 18 Me. 84.

⁴ Harmor v. Bird, 22 Wend. 113.

⁵ Diamond v. Harris, 33 Tex. 634; O'Neil v. Flanagan, 64 Mo. (App.) 88.

⁶ Harriman, Contr. 287.

⁷ Sorrells v. McHenry, 38 Ark. 127; Morrow v. Hanson, 9 Ga. 398, 54 Am. Dec. 346; House v. Kendall, 55 Tex. 40.

the part which failed is simply a nullity and imparts no taint to the residue; if there is a substantial consideration left it will still be sufficient to sustain the contract.⁸ A partial failure of consideration has been held in some cases a defense *pro tanto*.⁹

⁸ Deshe v. Robinson, 17 Ark. 228; Whincup v. Hughes, L. R. 6 C. P. 78; Hodgbon v. Golder, 75 Me. 293; Allen v. U. S. Bank, 20 N. J. L. 620; Johnston v. Smith, 86 N. C. 498.

⁹ Folsom v. Mussey, 8 Me. 400, 23 Am. Dec. 522; Smith v. Busby, 15 Mo. 387, 57 Am. Dec. 207.

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CHAPTER V.

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§ 115. *Introductory.*

Having examined the methods by which a contract may be formed, we pass now to the question as to its binding nature in view of the parties who have entered into it, for the purpose of determining whether or not they were legally capable of contracting. And it will be found that the following are under a greater or less disability in this respect, viz.: (A) The State or Government; (B) Aliens; (C) Convicts; (D) Corporations; (E) Infants; (F) Married Women; (G) Insane Persons; (H) Drunkards, and (I) Agents.

A.

THE STATE OR GOVERNMENT.

§ 116. *Power of State to Contract.*

The power of the United States government and the governments of several States to make contracts is "an incident

to the general right of sovereignty," and this capacity to contract is coextensive with the functions of the State or government.² The power is absent where it is in opposition to an express constitutional limitation or inhibition or where it is beyond the sphere and not in furtherance of the objects for which the government was organized. But when a State enters into a contract it can claim no exemption from the rules of law applicable to contracts between individuals.³ The State is not bound by general words in a statute which invade its prerogative of sovereignty.⁴ Unless it is expressly named, neither the general government nor a State is bound by a statute of limitation or bankruptcy,⁵ nor by a statute restricting the manner in which certain suits should be brought.⁶

§ 117. *May Sue on Its Contracts.*

The State or government has the same power of bringing and maintaining suits as an individual has.¹ A State may sue in its own courts or in the courts of another State or in the Federal courts and the national government may sue in the State courts.² A public officer cannot sue on a public contract made by him; the action must be brought by his principal, the government.³

¹ U. S. v. Lane, 3 McLean 365; U. S. v. Tingey, 5 Pet. 114; Floyd Acceptances, 7 Wall. 666.

² U. S. v. Maurice, 2 Brock, 96; U. S. v. Lane, 3 McLean, 365; Danolds v. State, 89 N. Y. 36, 42 Am. Rep. 277.

³ Patton v. Gilmer, 42 Ala. 548, 94 Am. Dec. 665.

⁴ Commonwealth v. Baldwin, 1 Watts. 54; U. S. v. Hoar, 2 Mason 311; Savings Bank v. U. S., 19 Wall. 279.

⁵ People v. Herkimer, 4 Cow. 543, 15 Am. Dec. 379.

⁶ Savings Bank v. U. S., 19 Wall. 227.

¹ U. S. v. Barker, 1 Paine 156; State v. Grant, 10 Minn. 39; Spencer v. Brockway, 1 Ohio 122, 13 Am. Dec. 259; People v. St. Louis, 5 Gilm. 351, 48 Am. Dec. 377; U. S. v. Murdock, 18 La. 345, 89 Am. Dec. 651; State v. Burkholder, 30 W. Va. 593, 5 S. E. Rep. 439; U. S. v. Holmes, 105 Fed. 41.

² Cases in last note.

³ Gray v. Paxton, Quincy, 541; Irish v. Webster, 5 Me. 171.

§ 118. *But Cannot Be Sued.*

Neither the United States¹ nor a State² may be sued. This is a privilege of sovereignty originally belonging to the king who, for reasons of public policy, was exempt from being made a defendant in his courts. But the State or government may consent to the suit by waiving its exemption³ or may grant permission by some statutory or constitutional provision.⁴

“The only remedy for a party who has entered into a contract with a State is by an appeal to the legislature, who it is fair to presume will from motives of public duty make provision for its full execution and do ample justice to the party with whom it may have contracted; or else refer the case to the decision and judgment of the judiciary by a special legislative enactment.”⁵

§ 119. *Public Officers and Agents.*

The government contracts through its officers and agents. When the form of contracting is prescribed by law these agents must make the contract in that form.¹ The rule that

¹ U. S. v. Clarke, 8 Pet. 436; U. S. v. Murdock, 18 La. 705, 89 Am. Dec. 651; The Siren, 7 Wall. 153; Orleans Nav. Co. v. The Amelia, 7 Mart, 590, 12 Am. Dec. 516.

² Hunsaker v. Borden, 5 Cal. 288, 63 Am. Dec. 130; Michigan Bk. v. Hastings, 1 Doug. 225; Troy, etc., R. Co. v. Commonwealth, 127 Mass. 43.

³ Cohens v. Virginia, 6 Wheat 214; Garr v. Bright, 1 Barb. Ch. 157.

⁴ Divine v. Harvie, 7 T. B. Mon. 439, 18 Am. Dec. 194. For example, a remedy in certain cases against the United States has been given by the establishment of the court of claims. Nicholl v. U. S., 7 Wall. 122; Finn v. U. S., 123 U. S. 227; U. S. v. Cummings, 130 U. S. 152. And in many of the states provision is made whereby the State is amenable to some judicial tribunal at the instance of its citizens. Wesson v. Com., 144 Mass. 60, 10 N. E. 762; Green v. State, 73 Cal. 29, 11 Pac. 602; Board of Education v. State Board, 106 N. C. 81, 10 S. E. 1002.

⁵ Michigan State Bank v. Hastings, 1 Doug. (Mich.) 225, 41 Am. Dec. 549.

¹ People v. Talmage, 6 Cal. 256; Delafield v. Illinois, 2 Hill. 159; Mayor of Baltimore v. Reynolds, 20 Md. 1, 83 Am. Dec. 535; Clark v. U. S., 95 U. S. 539.

an agent may bind his principal by acts in violation of his special instructions, if they are within the scope of his general authority, does not apply to public officers, because their powers are a matter of record in the public law.² Therefore the government, even where it waives its privilege, is bound only when the officer is actually authorized to make the contract.³ A public officer, unlike a private agent,⁴ is not personally liable on a contract made in his own name, for it is 'not to be presumed that the party dealing with such public officer, means to rely upon his individual responsibility.'⁵

§ 120. *Foreign Governments and Their Representatives.*

The same rules which apply to a government in its own courts, apply to it in foreign courts. Foreign States and sovereigns and their representatives are not subject to the jurisdiction of the courts of another country unless they submit themselves to it. They have full power to make a contract, but it cannot be enforced against them unless they so choose, although they are capable of enforcing it.¹ In *Mighell v. Sultan of Jahore*,² the sovereign of a petty Indian State had

² *Mayor of Baltimore v. Reynolds*, 29 Md. 1, 83 Am. Dec. 535.

³ *Woodward v. Campbell*, 39 Ark. 350; *State v. Bevers*, 86 N. C. 588; *Lee v. Munro*, 7 Cranch, 366; *The Floyd Acceptances*, 7 Wall. 666; *State v. Hayes*, 52 Mo. 578; *Noble v. U. S.*, 11 Ct. of Cl. 608.

⁴ See post; Agents.

⁵ *Pine v. Huber Manfg. Co.*, 83 Ind. 121; *Hodgson v. Dexter*, 1 Cranch 345; *Walker v. Swartwout*, 12 Johns. 444; *Hodges v. Runyan*, 30 Mo. 491; *Bronson v. Wolsey*, 17 Johns. 46.

¹ *Hullet v. King of Spain*, 1 D. & C. 175; *Taylor v. Best*, 14 C. B. 487; *King of Spain v. Oliver*, 1 Pet. C. C. 276; *Republic of Mexico v. Anangors*, 11 How. Pr. 1; *Tagart v. State*, 15 Mo. 209; *Holbrook v. Handerson*, 4 Sandf. 619; re Baiz, 135 U. S. 403. The exemption does not extend to Consuls unless so provided in a treaty or statute. *Bors v. Preston*, 111 U. S. 282. A foreign Government is bound by a contract within the scope of the authority of its agents. *Canadian Car Co. v. American Car Co.*, 258 Fed. 363. *King of Prussia v. Knepper*, 22 Mo. 550.

² 1 Q. B. 149 (1904).

made in England a promise of marriage and was sued on it in an English court. But it was held that the action would not lie.

“This case must be decided upon exactly the same considerations as if the ruler of some undoubted great Power—such as the King of Italy, or the President of the French Republic—had been sued in the courts of this country. To begin with, there is no precedent for saying that an independent sovereign ruler can be sued in our courts. On the contrary, the proposition is opposed to every principle of international law as applied to the persons of sovereigns or those who represent them. The ground upon which the immunity of sovereign rulers from process in our courts is recognized by our law is that it would be absolutely inconsistent with the status of an independent sovereign that he should be subject to the process of a foreign tribunal. * * * It is one thing to say that a foreign sovereign is capable of making an effectual contract in this country; it is quite another thing to say that he can be sued in the courts of this country.”

B.

ALIENS.

§ 121. *Aliens in General.*

An alien is the subject of a foreign government not naturalized under our laws. The rights of aliens in real property are generally regulated by statute.¹ In some States they may hold and transfer real estate, in others they may not. In respect to personalty and the obligations arising out of contracts and the remedies for breach of them, they have, during the existence of peace, substantially the privileges of citizens²

§ 122. *Alien Enemies.*

An alien enemy, *i. e.*, a citizen or subject of a nation with which we are at war, cannot without a license from our gov-

¹ Stimson Stat. Law 6013; State v. Smith, 70 Cal. 160.

² Taylor v. Carpenter, 3 Story 463.

ernment¹ make a new contract² or enforce one³ during the continuance of hostilities,⁴ and a contract made during the war cannot be enforced on return of peace.⁵

But the rights of the alien as to outstanding contracts made before the commencement of war are suspended, not annulled, and may be enforced upon the conclusion of peace.⁶ During the Civil War the inhabitants of the Confederate States and the United States occupied the positions of enemies, and as a consequence thereof all intercourse between them was interdicted, and contracts between them made during the existence of hostilities were void.⁷ Contracts existing before the war were preserved; it only suspended the remedy; but if the contract was of a continuing nature, as in the case of a partnership, and its performance would violate the laws governing a state of war, the parties were relieved from further obligations thereunder.⁸

¹ License will be implied from his being suffered to remain in this country after the outbreak of war. *Clark v. Morey*, 10 Johns. 68; *Otteridge v. Thompson*, 2 Cranch. C. C. 108; *Parkinson v. Wentworth*, 11 Mass. 26; *Heiler v. Goodman Motor Co.*, 108 Atl. 233, and see note in 3 A. L. R. 341; *Posselt v. D'Espaëd*, 100 Atl. 893 (N. J.).

² *Wright v. Graham*, 4 W. Va. 430; *Philips v. Hatch*, 1 Dillon 571; *Hill v. Baker*, 32 Iowa 302.

³ *Blackwell v. Willard*, 65 N. C. 402; *Wilcox v. Henry*, 1 Dall. 69; *Semmes v. City Ins. Co.*, 36 Conn. 543; *Johnson v. Decker*, 11 Johns. 418; *Haymond v. Camden*, 22 W. Va. 180.

⁴ *The Rapid*, 2 Gall. 4; *The Eliza*, 2 Gall. 4; *Crawford v. The Wm. Penn*, 3 Wash. C. C. 484.

⁵ *Hart v. U. S.*, 15 Ct. of Cl., 414; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617 and note; *U. S. v. Grossmayer*, 9 Wall. 72.

⁶ *Ware v. Hylton*, 3 Dall. 199; *Dunlop v. Ball*, 2 Cranch. 180; *Harman v. Kingston*, 3 Camp. 150; *Flindt v. Waters*, 15 East. 260.

⁷ *Materson v. Howard*, 18 Wall. 99; *Mutual Ins. Co. v. Hilyard*, 37 N. J. L. 444.

⁸ *Mutual Ins. Co. v. Hilyard*, 37 N. J. L. 444; *Bank of New Orleans v. Matthews*, 49 N. Y. 12; *Cohen v. N. Y. Ins. Co.*, 50 N. Y. 610. As to the effect of war on the contracts of alien enemies, see note to *Halsey v. Lowenfeld*, 2 K. B. 707 (1916), and *Zinc Corporation v. Hirsch*, 1 K. B. 541 (1916) in L. R. A., 1917, C. 662. Our trading with the enemy act (1917) applied only to persons resident in or carrying on business in the enemy country.

C.

CONVICTS.

§ 123. *Convicts' Contracts.*

Under the English common law a person convicted of a felony was considered civilly dead and could not make a valid contract nor could he enforce contracts made previous to his conviction.¹ In the United States this rule is practically obsolete and a convict undergoing a sentence of imprisonment, may, in the absence of a statutory provision on the subject,² enter into contracts and sue and be sued thereon.³

D.

CORPORATIONS.

§ 124. *Corporation Defined.*

A corporation is an artificial being created by law, composed of individuals united into one body under a collective name, with the capacity of perpetual succession, and of acting as a natural person within the scope of its charter.¹ Cor-

¹ Chitty, Contr. 261; Pollock, Contr. 94.

² In Missouri by statute a trustee takes charge of the convict's affairs as though he were dead, and the convict, like any one else under guardianship, is incapable of making contracts and can neither sue nor be sued. Williams v. Shackelford, 97 Mo. 322; Presbury v. Hull, 34 Mo. 29; see re Nerac. 35 Cal. 392, 95 Am. Dec. 111. "There is no statute in Virginia that deprives a convict of the power to make contracts or conveyances as forfeiture of estate by conviction has been abolished." Therefore he has this right before the appointment of a statutory trustee. Haynes v. Peterson, 100 S. E. 471. But not after. Williams v. Shackelford, 97 Mo. 322, 11 S. W. 222.

³ Plattner v. Sherwood, 6 Johns. Ch. 118; Kenyon v. Sounders, 18 R. I. 590, 30 Atl. 470; Avery v. Everett, 110 N. Y. 317, 18 N. E. Rep. 148.

¹ Lawson Rights, Rem. & Pr., § 332; Fietsam v. Hay, 122 Ill. 293, 3 Am. St. Rep. 492; Deringer v. Deringer, 5 Houst. 416, 1 Am. St. Rep. 150.

corporations are either *public* or *private*, the former being such as are created for the discharge of public duties in the administration of civil government, as for example municipal corporations,² the latter being such as are created for private advantage, profit or benefit.³ Corporations which are organized for private profit, but yet exercise functions and powers in which the public are interested, as for example railroad, turnpike, or canal companies, are sometimes termed *quasi-public* corporations,⁴ yet in so far as their rights and liabilities to contract are concerned they are subject to the rules of law governing private corporations.⁵

§ 125. *Contracts of Corporations—When Binding.*

A corporation, then, has power to make such contracts as are either expressly or impliedly authorized by its charter or act of incorporation, and in general an express authority to make a given kind of contract is not indispensable, provided they are not foreign to the corporate purpose.¹ Thus a corporation has an implied power to purchase and hold property necessary to the carrying on of its business² and to transfer and dispose of it when necessary;³ to borrow money and make

² *Regents v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72; *Ten Eyck v. Canal Co.*, 18 N. J. (L.) 200, 37 Am. Dec. 233.

³ *Logwood v. Bank*, Minor 23; *Cleveland v. Stewart*, 3 Ga. 283.

⁴ See *Lawson Rights, Rem. & Pr.* § 332; *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Louisville, etc., R. Co. v. County Court*, 1 Sneed 637, 62 Am. Dec. 424. *Pierce v. Com.*, 104 Pa. St. 150.

⁵ For a full view of this important subject see the great and exhaustive treatise of Judge Seymour D. Thompson.

¹ *Barnett v. Franklin College*, 37 N. E. Rep. 431 (Ind.); *Thomas v. R. R. Co.*, 101 U. S. 82; *Perrine v. Canal Co.*, 9 How. 184; *Wechler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95.

² *Banks v. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706; *Spear v. Crawford*, 14 Wend. 22, 28 Am. Dec. 513; *McCarter v. Orphan Asylum*, 437, 18 Am. Dec. 517.

³ *Treadwell v. Mfg. Co.*, 7 Gray 373, 66 Am. Dec. 490; *Warfield v. Canning Co.*, 72 Iowa 666, 2 Am. St. Rep. 263.

debts for the purpose of its business,⁴ and to issue negotiable paper of other evidence of its indebtedness.⁵

§ 126. *Powers of Corporations—Meaning of Ultra Vires.*

A corporation has only such powers as are expressly conferred upon it by its charter or as are necessary to carry such powers into effect.¹ Any act of the corporation beyond its express or implied powers is said to be *ultra vires*; and though such acts are void, it is not because they are illegal but simply because the corporation is without capacity to perform them. "When acts of corporations are spoken of as *ultra vires* it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation."²

§ 127. *Contract Ultra Vires Unenforceable Unless Executed.*

A contract *ultra vires*, that is to say, outside of and not authorized by its charter—may be avoided by either party so long as it remains unexecuted.¹ Courts will not compel a

⁴ Lawson Rights, Rem. & Pr., § 383; Mining Co. v. Bank, 104 U. S. 192; Moss v. Harpeth Academy, 7 Heisk. 285.

⁵ Munro v. Commission Co., 15 Johns. 44, 8 Am. Dec. 219; Curtis v. Leavitt, 15 N. Y. 173.

¹ Dartmouth College v. Woodward, 4 Wheat. 636; New York Fireman's Ins. Co. v. Ely, 5 Conn. 560, 13 Am. Dec. 100; Matthews v. Skinker, 62 Mo. 329, 21 Am. Rep. 425; Chicago Gas Co. v. People's Gas Co., 121 Ill. 530.

² Whitney Arms Co. v. Barlow, 63 N. Y. 68, 20 Am. St. Rep. 504; Slater Woolen Co. v. Lamb, 143 Mass. 420; Central Trans. Co. v. Pullman Car Co., 139 U. S. 24.

¹ Bradley v. Ballard, 55 Ill. 413, 7 Am. Rep. 656. The court saying: "This doctrine (of estoppel) is applied only for the purpose of compelling corporations to be honest in the simplest and commonest sense of honesty, and after whatever mischief may belong to the performance of an act *ultra vires* has been accomplished. But while a contract remains executory it is perfectly true that the powers of corporations cannot be extended beyond their proper limits for the purpose of enforcing a contract. Not only so, but on

corporation to perform a contract *ultra vires*.² Nor will they enforce specific performance of a contract *ultra vires* at the suit of the corporation.³ But, where the contract cannot be enforced because it is *ultra vires*, the benefits which either party has received under the contract the courts will require to be repaid to the other.⁴ And where the contract has been performed or partially performed by either of the parties, the other cannot set up as a defense to an action that the corporation had no authority to enter into it.⁵

Any contract made or act done by a corporation, contrary to a rule of law, is as invalid as such a contract or act would be in the case of an individual;⁶ and the same principle applies to contracts or acts prohibited by statute.⁷ So, too, where the act or contract is in violation of any provision in the charter or act of incorporation,⁸ though a distinction is to be made in this latter case, which is, that where it appears clear from the words of the charter that the legislature intended that a forbidden act or contract should be absolutely

the application of a stockholder or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. So, too, if a contract *ultra vires* is made between a corporation and another person, and while it is yet wholly unexecuted the corporation recedes, the other contracting party would probably have no claim for damages."

² *Hitchcock v. Galveston*, 96 U. S. 341; *Bank v. Niles*, Walk. Ch. 99; *Staacke v. Routledge* (Tex.), 241 S. W. 994.

³ *Bank v. Niles*, 1 Doug. (Mich.) 401, 41 Am. Dec. 575; *Nassau Bk. v. Jones*, 95 N. Y. 115.

⁴ *Brice's Ultra Vires* (2 Ed.) 768; *Hardy v. Land Co.*, L. R. 7 Ch. 427; *in re Phoenix Life Ass. Co.*, 2 Johns. & H. 441; *Humphrey v. Patrons' Assn.*, 50 Ia. 607; *New Castle R. Co. v. Simpson*, 23 Fed. Rep. 214.

⁵ *Morawetz on Corporations*, § 100; *Hitchcock v. Galveston*, 96 U. S. 341; *Slater Woolen Co. v. Lamb*, 143 Mass. 420.

⁶ *Thomas v. R. Co.*, 10 U. S. 71; *Messenger v. R. Co.*, 36 N. J. L. 413, 13 Am. Rep. 457. See post; *Illegality of Contract*.

⁷ *Pangborn v. Westlake*, 36 Iowa 546; *Harris v. Runnels*, 12 How. 79.

⁸ *Taylor v. R. Co.*, L. R. 2 Ex. 379; *Sherwood v. Alvis*, 83 Ala. 115, 3 Am. St. Rep. 695.

void, it will be so held by the courts;⁹ while on the other hand, where the prohibition in a charter appears to have been inserted for the benefit of the shareholders only, a contract or act in violation of the prohibition, though *ultra vires*, is not absolutely void, but may be executed and ratified by the corporation.¹⁰

Formerly the assent of the corporation could only be shown by the use of its corporate seal, but it is now well settled in this country at least that this is not essential, and that a corporation may make a valid contract without the use of a seal.¹¹

E.

INFANTS.

§ 128. *Introductory.*

An infant or minor is without capacity (subject to the exceptions to be presently noticed) to make a binding contract. And as this incapacity could not without great confusion be determined as a matter of fact in each particular case, the law has established an arbitrary age under which all persons are incapable as a matter of law of entering into contracts. This age the common law declares to be the age of twenty-one¹ and so do our statutes for the most part, though in some States by statute females reach their majority at the age of eighteen. It is obvious that a man within a few months of twenty-one may be as well able to protect his rights as one a

⁹ In *Re Comstock*, 3 Saw. 218; *Bank v. Page*, 6 Or. 431.

¹⁰ *Hazelhurst v. R. Co.*, 43 Ga. 13; *National Bank v. Matthews*, 98 U. S. 621; *Thornton v. Bank*, 71 Mo. 221.

¹¹ *Mott v. Hicks*, 1 Cow. 513, 13 Am. Dec. 551; *Barker v. Ins. Co.*, 3 Wend. 94, 20 Am. Dec. 664; *Bank of U. S. v. Dandridge*, 12 Wheat. 64; *Bank of Columbia v. Patterson*, 7 Cranch. 299; *Danforth v. Schoharie Turnpike Co.*, 12 Johns. 227. See ante, § 71.

¹ A person arrives at his majority on the day preceding his 21st birthday and on the first minute of that day. *Bardwell v. Parrington*, 107 Mass. 425.

few months over that age and much better than an infant of six; yet the law makes no distinction but holds a youth who has nearly reached his majority to be no more bound by his contract than a child of tender years.² The infant's emancipation by the parent does not make his contracts otherwise voidable, absolutely binding upon him. He may still take advantage of his infancy as before. The effect of the emancipation is simply to release him from the parent's control and to give him the right to his own earnings.³ So the marriage of a male infant does not render his general contracts any the more binding; nor is the condition of infancy removed from a female infant by her marriage, by reason of statutes which confer capacity upon married women either to contract generally or to convey their real estate or relinquish their claims to dower in the lands of their husbands.⁴

A parent, according to the English common law, is not under any legal obligation to pay the debts of his minor child, and this extends even to necessary food, clothing and shelter. Says an English judge:

"People are very apt to imagine that a son stands in this respect upon the same footing as a wife.⁵ But this is not so. If it be asked is then the son to be left to starve? The answer is he must apply to the authorities, and they will compel the father, if of ability, to pay for his son's support."⁶

The English rule is followed in some of the States,⁷ their

² *McCarty v. Carter*, 49 Ill. 53, 95 Am. Dec. 572.

³ *Mason v. Wright*, 13 Met. 306; *Tyler v. Estate of Gallop*, 68 Mich. 185, 13 Am. St. Rep. 336.

⁴ *Inhab. of Taunton v. Inhab. of Plymouth*, 15 Mass. 203; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Watson v. Billing*, 38 Ark. 278, 42 Am. Rep. 1. The capacity of an infant to contract for necessities is, however, enlarged by his marriage; for he is bound for the reasonable value of necessities furnished his family as well as himself. Post, § 159.

⁵ As to which see post, § 159.

⁶ *Shelton v. Springett*, 11 C. B. 452; *Mortimore v. Wright*, 6 M. & W. 486.

⁷ *Hunt v. Thompson*, 4 Ill. 180, 36 Am. Dec. 538; *Gordon v. Potter*, 17 Vt. 348; *Freeman v. Robinson*, 38 N. J. (L.) 383, 20 Am. Rep. 399;

courts holding that either an express promise or circumstances from which an implied promise can be inferred are essential to bind the parent for necessities furnished his infant child by a third person. Other courts, on the contrary, basing their decision on the ground that there is a legal as well as a moral duty upon a parent to support his minor children, create from this duty alone a promise to pay for necessities supplied to them.⁸

§ 129. *Infants' Contracts Voidable, Not Void.*

Many of the earlier American cases are to the effect that such contracts as the infant may make which are manifestly to his prejudice and against his interest are void,¹ while those which it is uncertain whether they are to his benefit or preju-

Holland v. Hawtley, 171 N. C. 376, 88 S. E. 507; Sassaman v. Wells, 178 Mich. 167, 144 N. W. 478, and see note to Hunnecutt Co. v. Thompson, 40 L. R. A., N. C., N. S. 488.

⁸ Van Valkenburg v. Watson, 13 Johns. 480, 7 Am. Dec. 395; Dawson v. Dawson, 69 Ia. 641, 29 N. W. Rep. 759; Porter v. Powell, 79 Ia. 151, 18 Am. St. Rep. 353; Manning v. Wells, 85 Hum. 27. The rule in Missouri appears unsettled. See Holt v. Baldwin, 46 Mo. 265; Girls' Home v. Fritchey, 10 Mo. (App.) 344. In Huke v. Huke, 44 Mo. (App.) 313, Thompson, J., says: "I have looked through our Missouri cases without satisfying myself what the state of the law is on this question." But see Rankin v. Rankin, 83 Mo. (App.) 336. In a recent Massachusetts case it is said: "If there is a legal obligation, it must rest upon the ground that he is entitled to the custody, the society, and the services of the child. He must also have the right to determine where his child shall live. If a son chooses to leave voluntarily his father's house, and live elsewhere, his father is not responsible for his support. So, if a child is induced by another to leave his father, without any necessity for so doing, the person thus influencing him to leave would, in case he should furnish supplies, have no cause of action against the father." Foss v. Hartwell, 168 Mass. 66, 46 N. E. Rep. 411; Bear v. Bear (Va.), 109 S. E. 313.

¹ Wheaton v. East, 5 Yerg. 41, 26 Am. Dec. 251; Dana v. Combs, 6 Me. 89, 19 Am. Dec. 194; Lawson v. Lovejoy, 8 Me. 405, 23 Am. Dec. 527; Maples v. Wightman, 4 Conn. 376, 10 Am. Dec. 149. Some courts hold that the appointment by an infant of an agent or attorney is void. Trueblood v. Trueblood, 8 Ind. 195; Petrow v. Wiseman, 40 Ind. 148; Carlile v. Oil Co. (Okla.), 210 P. 377.

dice are voidable at his election.² But it may now be considered as the settled rule that none of an infant's contracts are void because of his nonage, but all of them are merely voidable. The distinction that his contracts which cannot be for his benefit are absolutely void, has become to be recognized as unreasonable and absurd; for the object of the law which is to protect the infant against the consequences of his own indiscretion or the imposition of others is completely secured by conferring upon him the power of disaffirming his contracts or of ratifying them after reaching proper age, at his pleasure. There are serious difficulties in the way of the court determining either from the face of the transaction or from a collateral inquiry whether the contract was for the benefit or detriment of the infant, and it is much better to leave the question entirely to the infant to say whether the contract shall or shall not be binding upon him.³

§ 130. *Infant's Concealment or Misrepresentation as to Age.*

The contract of an infant otherwise voidable cannot be enforced against him because he dealt or traded as an adult. He is not thereby estopped from pleading his infancy as a defense.¹ Nor is he estopped from disaffirming his deed and maintaining an action to recover the land by the fact that he was believed by the grantee to be an adult.² Nor is his con-

² U. S. v. Bambrough, 1 Mason. 71; Tucker v. Moreland, 10 Pet. 59, 1 Am. Lead. Cas. 224; Green v. Welding, 59 Iowa 679, 44 Am. Rep. 696. Other cases adopt this latter test in a somewhat qualified form, asserting that no contracts of an infant are void, unless they necessarily, or clearly, or certainly operate to his prejudice; Oliver v. Houdlett, 13 Mass. 237, 7 Am. Dec. 134; Hastings v. Dolanhide, 24 Cal. 195.

³ Hyer v. Hyatt, 3 Cranch. C. C. 276; Cheshire v. Barrett, 4 McCord 241, 17 Am. Dec. 735, 738; Mustard v. Wohlford's Heirs, 15 Gratt. 329, 76 Am. Dec. 209; Harner v. Dipple, 31 Ohio St. 72, 27 Am. Rep. 496. See note to Craig v. Van Bibber, 100 Mo. 584, in 18 Am. St. Rep. 573-722.

¹ Miller v. Blankley, 38 L. T. 527; Houston v. Cooper, 3 N. J. L. 866; Curtin v. Patton, 11 Serg. & R. 305.

² Buchanan v. Hubbard, 96 Ind. 1.

tract binding at law because he falsely represented himself to be of full age, and the other party relied upon such representation.³ In equity, also, an infant is not estopped from avoiding his contract from the fact that he did not disclose his minority and the other party believed him to be an adult and dealt with him on that supposition.⁴ If, however, he fraudulently represents that he is of full age or actively conceals his minority, he will be estopped in equity from so doing.⁵

§ 131. *The Non-Voidable Contracts of An Infant.*

There are certain contracts of an infant from which he cannot escape entire liability and these are: 1. Contracts made under a statutory authority. 2. Contracts which, if he had not made, the law would have compelled him to execute. 3. Ante-nuptial debts of wife. 4. Contracts for necessities.

§ 132. *Contracts Under Statutory Authority.*

If a contract of a minor be entered into under the authority of a statute, it is binding upon him, so far as the question of infancy is concerned and cannot be disaffirmed. Whether infants are included when not expressly mentioned in statutes, which provide for the execution of contracts under peculiar circumstances, is a question of legislative intent. Where it is general in its terms, and may apply to infants as well as adults, they will be included, unless a contrary intent appears.¹

³ *Bartlett v. Wells*, 1 Best & S. 838; *Conroe v. Birdsall*, 1 Johns. Cas. 127, 1 Am. Dec. 105; *Burley v. Russell*, 10 N. H. 184, 34 Am. Dec. 146; *Conrad v. Lane*, 26 Minn. 389, 37 Am. Rep. 412; *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Lewis v. Van Cleve* (Ill.), 134 N. E. 804.

⁴ *Stikeman v. Dawson*, 1 De Gex. & S. 90; *Baker v. Stone*, 136 Mass. 405; *Alvey v. Reed*, 115 Ind. 148, 7 Am. St. Rep. 418.

⁵ *Ferguson v. Bobo*, 54 Miss. 121; *Pemberton Assn. v. Adams*, 31 Atl. 280 (N. J.); *Ryan v. Growney*, 125 Mo. 474, 28 S. W. 189.

¹ *Earl of Bucks v. Drury*, Wilmut 194; *People v. Mullin*, 25 Wend. 698.

A recognizance or bond entered into by a minor for his personal appearance at court is binding on him under statutes authorizing recognizances, and making no distinction between minor defendants and other persons.² The government may enlist minors into the army and navy without the consent of parents, guardians or masters, which is subordinate to its sovereign power to call upon its citizens to protect its existence.³

§ 133. *Contracts Which Law Would Have Compelled.*

Where a person does that which by law he is compelled to do, he is bound, and infants are not excepted from this rule.¹ Thus, an infant's conveyance as trustee of the naked legal title being only that which a court of equity would have compelled him to make, he cannot disaffirm it on attaining majority.² An infant being bound to pay taxes on his property, one who does so, being an owner in common with him of the land, may recover his proportion from the infant.³

§ 134. *Ante-Nuptial Debts of Wife.*

An infant husband is liable at common law for all the ante-nuptial debts of the wife if she were adult when she contracted them, and for her debts for necessities, if she were an infant. This is not due to any contract on his part, but is a common law incident to the marriage; and the fact that the husband is an infant furnishes no excuse.¹

² State v. Weatherwax, 12 Kan. 463; Dial v. Wood, 9 Baxt. 296; McCall v. Parker, 13 Met. 372; People v. Moores, 4 Denio. 518, 47 Am. Dec. 272.

³ United States v. Bainbridge, 1 Mason 71; re Morrissey, 137 U. S. 157.

¹ Bavington v. Clarke, 2 Pen. & W. 115, 21 Am. Dec. 432; Irvine v. Irvine, 9 Wall. 617.

² Elliot v. Horn, 10 Ala. 348, 44 Am. Dec. 488; Slarr v. Wright, 20 Ohio St. 97; Trader v. Jarns, 23 W. Va. 100.

³ Horstmeyer v. Connors, 56 Mo. (App.) 115.

¹ Roach v. Quick, 9 Wend. 238; Butler v. Breck, 7 Met. 164, 39 Am. Dec. 798.

§ 135. *Infant Liable for "Necessaries."*

An infant is liable for the reasonable value of necessities which may have been furnished to him, for otherwise he might not be able to procure suitable food, clothing, shelter and education, though possessed of the means of paying for them in the future.¹ And he need not have expressly promised to pay for them; it is sufficient that they were furnished under such circumstances that a promise to pay for them can be implied.² Indeed, he cannot be held on an express contract to pay for them, if it appears that the price fixed by such contract is more than what they were reasonably worth.³

He is liable for necessities, only where they have been actually furnished to him; not for breach of his contract to take and pay for them.⁴

§ 136. *What Are "Necessaries."*

The term "necessaries" is a relative one; what would be "necessaries" in the case of one person might not be in the case of another.¹ They are not merely such things as are absolutely essential for his existence and support, but such as are suitable to his station in life and to his circumstances at the time.² Food,³ clothing,⁴ proper lodging,⁵ instruction,⁶ medical

¹ Earle v. Reed, 10 Metc. 387; Kline v. L. Amoureux, 2 Paige 419, 22 Am. Dec. 652. And this includes also necessities for the wife and children of an infant husband. Tupper v. Caldwell, 12 Metc. 562.

² Gay v. Ballou, 4 Wend. 403, 21 Am. Dec. 158.

³ See post, § 138.

⁴ Pool v. Pratt, 1 Chip. 252.

⁵ Breed v. Judd, 1 Gray 455; Epperson v. Nugent, 57 Miss. 45, 34 Am. Rep. 434.

⁶ Watson v. Cross, 2 Duv. 147; Wilhelm v. Hardman, 13 Md. 144; Stone v. Dennison, 13 Pick 6, 23 Am. Dec. 654; Ryder v. Wombwell, L. R. 4 Ex. 32; Strong v. Foote, 42 Conn. 203; Nicholson v. Spencer, 11 Ga. 610. A watch may be a necessary in some cases. Peters v. Fleming, 6 M. & W. 42. So may wedding clothes. Sams v. Stockton, 14 B. Mon. 187; or a bridal outfit. Jordan v. Coffield, 70 N. C. 110.

³ Saunders v. Ott, 1 McCord 572; Barnes v. Barnes, 50 Conn. 572. This includes entertainment at an inn. Watson v. Cross, 2 Duv. 174.

attendance, or nursing, or medicine, or articles furnished for the purpose of health, are clearly within the term.⁷

And the following limitations to the wider construction which might be given to this definition are supported by the authorities.

(a) The things must be necessary in the particular case for *use* and not for mere ornament.⁸ Jewelry, kid gloves, cologne and walking canes are not "necessaries."⁹

(b) They must be for the substantial good of the infant and not for his mere pleasure.¹⁰ Thus liquor, pistols and powder, saddles and bridles, fiddles and fiddle-strings,¹¹ cigars and tobacco,¹² a horse purchased for pleasure,¹³ a bicycle,¹⁴ a buggy,¹⁵ money furnished for traveling expenses on a pleasure trip,¹⁶ are not "necessaries."

(c) They must concern the *person* and not the estate of the infant.¹⁷ Therefore, articles purchased or a building leased to

⁴ Saunders v. Ott, *supra*.

⁵ Rivers v. Gregg, 5 Rich. (Eq.) 275; Price v. Saunders, 60 Ind. 310.

⁶ This includes a common school education. Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537; Saunders v. Ott, 1 McCord 572. A contract of apprenticeship to learn a useful trade. Pardee v. American Co., 20 R. I. 149, 37 Atl. Rep. 706. But not ordinarily a collegiate education. Middlebury College v. Chandler, *supra*. And certainly not a professional education. Bouchell v. Clary, 3 Brev. 194; Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574.

⁷ Saunders v. Ott, 1 McCord 574; Price v. Saunders, 60 Ind. 310. So of the services of a dentist. Strong v. Foote, 42 Conn. 203.

⁸ McKanna v. Merry, 61 Ill. 179; Peters v. Fleming, 6 M. & W. 42.

⁹ Lefils v. Sugg, 15 Ark. 137.

¹⁰ McKanna v. Merry, 61 Ill. 179; Wharton v. McKenzie, 5 Q. B. 606; Middlebury College v. Chandler, 16 Vt. 683, 42 Am. Dec. 537; Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 574.

¹¹ Saunders v. Ott, 1 McCord 572; Beeler v. Young, 1 Bibb. 119.

¹² Bryant v. Richardson, L. R. 3 Ex. 93, note.

¹³ Price v. Saunders, 60 Ind. 310; House v. Alexander, 105 Ind. 109, 55 Am. Rep. 189; aliter where it is on the advice of a physician for necessary exercise. Hart v. Prater, 1 Jur. 623.

¹⁴ Pyne v. Wood, 145 Mass. 558.

¹⁵ Howard v. Simpkins, 70 Ga. 322.

¹⁶ McKanna v. Merry, 61 Ill. 177; aliter for a necessary journey. Breed v. Judd, 1 Gray 455.

¹⁷ Decell v. Lowenthal, 57 Mass. 331, 34 Am. Rep. 449; New Hamp. Mut. Ins. Co. v. Noyes, 32 N. H. 345.

carry on a business or trade are not "necessaries;"¹⁸ nor supplies,¹⁹ nor stock,²⁰ nor a wagon²¹ furnished him to carry on a plantation or farm, nor labor or materials for the erection of houses or buildings on his lands,²² or in repairing them,²³ nor an insurance policy on his property,²⁴ nor money lent to him to remove incumbrances on his estate.^{24a} But the services of an attorney and the expenses of a purely personal suit are "necessaries," as for instance prosecuting a suit for personal injuries,²⁵ defending him on an indictment for a crime,²⁶ or in a bastardy suit,²⁷ or in an action for breach of promise of marriage.²⁸ It is otherwise, of course, where the services are rendered in recovering the infant's lands.²⁹

(d) They must not, even though they are "necessaries," be extravagant either in quality or quantity.³⁰ Things may be of a useful character, but the quality or quantity supplied may take them out of the character of necessities. Elementary text-books might be a necessary to a student of law, but not a rare edition of "Littleton's Tenures," or eight or ten copies

¹⁸ *House v. Alexander*, 105 Ind. 109; *Pyne v. Wood*, 148 Mass. 558.

¹⁹ *Decell v. Lowenthal*, supra; *State v. Howard*, 88 N. C. 680.

²⁰ *Rainwater v. Durham*, 2 N. & Mc. 524, 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. 27, 36 Am. Dec. 296; *House v. Alexander*, 105 Ind. 109, 55 Am. Rep. 189.

²¹ *Paul v. Smith*, 41 Mo. (App.) 281.

²² *Freeman v. Bridger*, 4 Jones (L.) 1, 67 Am. Dec. 258; *Price v. Jennings*, 62 Ind. 111.

²³ *Tupper v. Caldwell*, 12 Metc. 559, 46 Am. Dec. 704; *Horstmeyer v. Connors*, 56 Mo. (App.) 115.

²⁴ *New Hampshire, etc., Ins. Co. v. Noyes*, 32 N. H. 345.

^{24a} *West v. Gregg*, 1 Grant's Cas. 53; *Magee v. Welsh*, 18 Cal. 55.

²⁵ *Midland Valley R. Co. v. Johnson*, 215 S. W. 655. As to the power of a guardian ad litem or next friend to bind the infant by a contract with an attorney, see note to *Plummer v. R. Co.*, 98 Wash. 67, 167 Pac. 73, in 7 A. L. R. 108.

²⁶ *Askey v. Williams*, 74 Tex. 294; *State v. Weatherwax*, 12 Kan. 463.

²⁷ *Barker v. Hubbard*, 54 N. H. 539, 20 Am. Rep. 160.

²⁸ *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151.

²⁹ *Phelps v. Worcester*, 11 N. H. 51. But see *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

³⁰ *Johnson v. Lines*, 6 W. & S. 80; *Nicholson v. Spencer*, 11 Ga. 610.

of "Kent's Commentaries."³¹ Neither would suitable clothing supplied in an unreasonable quantity.³²

(e) They must be necessary to his *wants*. Hence an infant cannot bind himself for what are *prima facie* necessities where his wants are supplied from some other source or he has a parent or guardian able and willing to provide for him.³³

One who trusts an infant does so at his peril and cannot recover for the price of articles furnished the infant on credit as necessities, if he was already sufficiently supplied.³⁴

"What are necessities? To determine this we must take into account what the infant had when he gave the order. A watch may be necessary, but if the infant is already supplied with a watch or watches, the one ordered could not be a necessary. It is said, however, that whether the infant is amply supplied is not to be regarded, where the tradesman is ignorant of the fact. If this were so the protection which is given to the infant would depend entirely on the knowledge of the tradesman, and the infant would be deprived of the protection intended to be afforded him by the law. In my view it is just as immaterial whether the plaintiffs did or did not know of the existing supply, as it is whether they did or did not know that the defendant was a minor."³⁵

Where an infant lives with his father or even his mother, or is under the care of a guardian, it is a reasonable presumption that he is properly supplied with necessities and he is therefore not liable for anything further in the absence of evidence to the contrary.³⁶ If a parent or guardian has furnished him with such articles as he regarded ample for his

³¹ Anson Contr., 112.

³² Johnson v. Lines, 6 W. & S. 80, 40 Am. Dec. 542.

³³ Wailing v. Toll, 9 Johns. 141; Kline v. L'Amoureux, 2 Paige 419, 22 Am. Dec. 652; Hoyt v. Casey, 114 Mass. 399, 19 Am. Rep. 371.

³⁴ Story v. Perry, 4 Car. & P. 526 Perrin v. Wilson, 10 Mo. 451; Nicholson v. Spencer, 11 Ga. 607; Kline v. L'Amoureux, 2 Paige 419, 22 Am. Dec. 652; Johnson v. Lines, 6 Watts & S. 80, 40 Am. Dec. 542; Ryder v. Wombwell, L. R. 4 Ex. 32.

³⁵ Barnes v. Tove, 13 Q. B. D. 410.

³⁶ Assignees of Hull v. Connolly, 3 McCord. 6, 15 Am. Dec. 612; Jones v. Colvin, 1 McMull. L. 14; Parsons v. Keys, 43 Tex. 557.

support according to his age and condition, or if he has been furnished with money by his parent or guardian or by an allowance from the court, sufficient to supply him with necessities, the presumption is that he has been adequately and properly supplied, and one who seeks to charge the infant for necessities in addition has the burden of proving that such is not the fact.³⁷

§ 137. *Borrowing Money for Necessaries.*

An infant is not liable at law for money borrowed by him to pay for necessities although actually expended by him for that purpose, though he is liable for money directly applied by the lender in procuring necessities for him.¹ The reason is that the lender, by intrusting the money to the infant, enables him to waste and misapply it, and his subsequent proper use of it could not confer an action where none existed, upon the contract of lending at the time of the loan. But perhaps the true reason is the want of privity between the lender and the one who supplies the necessities.²

§ 138. *Express Contracts for Necessaries.*

Whether an infant is ever bound by his express contract with reference to the price or value of necessities furnished him has been disputed. It is agreed, however, that he cannot be held for more than their reasonable value. He may bind himself to pay what they are reasonably worth, but not what he may foolishly have agreed to pay for them.¹ As said in a Massachusetts case: .

³⁷ *Nicholson v. Spencer*, 11 Ga. 607; *Nicholson v. Wilborn*, 13 Ga. 467.

¹ *Rearsby & Cuffer's Case*, Godb. 219; *Darby v. Boucher*, 1 Salk. 279; *Beeler v. Young*, 1 Bibb. 519; aliter in equity *Marlow v. Pitfield*, 1 P. Wms. 558; *Hickman v. Hall's Admrs.*, 5 Litt. 338.

² *Rivers v. Gregg*, 5 Rich. (Eq. 274; *Bradley v. Pratt*, 23 Vt. 378.

¹ *Locke v. Smith*, 41 N. H. 341; *Friar v. Rae Chandler & Co.* (Iowa), 185 N. W. 32.

“He is held on a promise implied by law and not strictly speaking on his actual promise. The law implies the promise to pay from the necessity of his situation just as in the case of a lunatic. In other words he is liable to pay only what the necessities were reasonably worth and not what he may improvidently have agreed to pay for them.”²

Therefore no action will lie against the infant unless the things have been furnished and accepted by him—he cannot make a binding executory agreement to purchase necessities. An infant away from home leases for a year a room or a house in which to live. He lives in it a month and then leaves it. He is liable only for the reasonable value of the premises for the month he occupied them.³

§ 139. *Securities Given for Necessaries.*

It has been held that an infant cannot be charged on a special contract or security given for necessities, as for example a bill of exchange or promissory note,¹ or an account stated,² or a bond with a penalty,³ or a mortgage deed.⁴

These conclusions are based either on the ground that the infant could not, if sued upon the security, show by parol the actual and real value of the consideration or on the ground that the infant's liability is quasi-contractual only.

As to negotiable paper the weight of authority seems to be that an action may be maintained against an infant upon his

² *Trainer v. Trumbull*, 141 Mass. 527; *Smith v. Crohn*, 37 S. W. Rep. 469 (Tex.); *Bear v. Bear* (Va.), 109 S. E. 313.

³ *Gregory v. Lee*, 64 Conn. 407, 30 Atl. Rep. 53; *Peck v. Cain*, 63 S. W. Rep. 177 (Tex.).

¹ *Williamson v. Watts*, 1 Camp. 552; *Swasey v. Vanderheyden*, 10 Johns. 33; *Bouchell v. Clary*, 3 Brev. 194; *Dubose v. Wheddon*, 4 McCord 221.

² *Trueman v. Hurst*, 1 T. R. 40; *Stone v. Dennison*, 13 Pick. 1, 23 Am. Dec. 654.

³ *Lawson Rights, Rem. & Pr.*, § 830; *Bliss v. Perryman*, 2 Ill. 484; *Hussey v. Jewett*, 9 Mass. 101.

⁴ *Id.* *Collins v. Wacker* (N. Y.), 188 N. Y. 871; life insurance premium.

negotiable paper given for necessities, either by the original payee or by any subsequent holder and that plaintiff may recover the full face of the paper or so much thereof as represents the reasonable value of the necessities; for infancy can be shown and the consideration of the paper be inquired into, no matter who may be plaintiff.⁵ But if the true nature of the infant's liability for necessities is quasi-contractual it would seem that the action on the express promise should be allowed in no case.⁶

§ 140. *Province of Judge and Jury.*

As to the province of judge and jury respectively in deciding the question of "necessaries" the rule is as follows: Evidence being given of the things supplied and the circumstances of the infant, the court determines whether the things supplied can reasonably be considered necessities at all; and if it comes to the conclusion that they cannot, the case may not even be submitted to the jury. If the judge concludes that the question is an open one, and that the things supplied are such as may reasonably be considered to be necessities, he leaves it to the jury to say whether, under the circumstances of the case, the things supplied were necessities as a fact, which determines this, taking into consideration the character of the things supplied, the extent to which the infant was already supplied with them, and the actual circumstances of the infant.¹

§ 141. *Ratification After Reaching Majority.*

An infant's voidable contract may be confirmed and ratified by him after he reaches his majority,¹ and this may be

⁵ Bradley v. Pratt, 23 Vt. 378; Earle v. Reed, 10 Met. 387.

⁶ Williamson v. Watts, 1 Camp. 552; Fenton v. White, 4 N. J. (L.) 111; Ayers v. Burns, 87 Ind. 245.

¹ Beeler v. Young, 1 Bibb. 519, 46 Am. Dec. 704; Merriam v. Cunningham, 11 Cush. 40; Grace v. Hale, 2 Humph. 27, 36 Am. Dec. 296.

¹ He can never ratify while his infancy continues for this would

done in three ways: 1. By an express ratification. 2. By an implied ratification from acts and conduct. 3. By omission to disaffirm the contract within a reasonable time after reaching majority.²

§ 142. *Express Ratification by New Promise.*

The infant on coming of age may bind himself by a new promise to perform the contract made by him during his infancy, and this it will be observed is an illustration of the limited class of cases in which a past consideration is allowed to support in subsequent promise.¹ It must be made to the other party or his agent,² and a mere acknowledgment is not sufficient;³ there must be a direct promise or the language used must show a willingness and intention to fulfill the contract.⁴

If the new promise is conditional it must be shown that the condition has been fulfilled.⁵ If the infant's new promise is

be giving him power to make a contract. *Corey v. Burton*, 32 Mich. 30; *Bank of Silver Creek v. Browning*, 16 Abb. Pr. 272.

² *Little v. Duncan*, 9 Rich. (L.) 55; *Tobey v. Wood*, 123 Mass. 88, 25 Am. Rep. 27; *Norris v. Vance*, 3 Rich. (Lv.) 164. In Missouri by statute an infant's voidable contract may be ratified in four ways and in these four ways only, viz.: First, an acknowledgment of or promise to pay such debt, made in writing; second, a partial payment upon such debt; third, a disposal of part or all of the property for which such debt was contracted; fourth, a refusal to deliver property in his possession or under his control, for which the debt was contracted, to the person to whom the debt is due, on demand thereof made in writing. *Koerner v. Wilkinson*, 96 Mo. (App.) 510.

¹ See ante, § 112; *Conklin v. Ogborn*, 7 Ind. 553; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117.

² *Goodsell v. Myers*, 3 Wend. 479; *Hoit v. Underhill*, 9 N. H. 436, 32 Am. Dec. 380; *Hodges v. Hunt*, 32 Barb. 180; *Mayer v. McLure*, 36 Miss. 389, 72 Am. Dec. 190.

³ *Benham v. Bishop*, 9 Conn. 330, 23 Am. Dec. 358; *Thompson v. Lay*, 4 Pick. 48, 16 Am. Dec. 325; *Baker v. Kennett*, 54 Mo. 82; *Tibbets v. Gerrish*, 25 N. H. 41, 57 Am. Dec. 307; *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574.

⁴ *Benham v. Bishop*, 9 Conn. 330, 23 Am. Dec. 358.

⁵ *Everson v. Carpenter*, 17 Wend. 419; *Thompson v. Lay*, 4 Pick. 48, 16 Am. Dec. 325; *Edgerly v. Shaw*, 25 N. H. 517, 57 Am. Dec. 349.

that he will pay his debt "as soon as he is able," or, "as soon as he can" no action can be sustained against him by virtue of such new promise without proof of his ability to pay.⁶

The ratification being simply a waiver of the objection of infancy and not a new contract may be verbal, although the contract ratified be an instrument under seal, or a contract required by law to be in writing.⁷ But in several of the states a promise of this kind is unenforceable unless in writing.⁸ These statutes apply to "new promises" and not to ratification by conduct and by failure to disaffirm.⁹

§ 143. *Must Be Made With Knowledge of Non-Liability.*

The ratification by an express new promise must, in order to bind, be made with full knowledge that he is not legally liable under the contract.¹

§ 144. *Effect of Ratification.*

A ratification once validly made cannot be recalled or disaffirmed,¹ and relates back to the time the contract was made

⁶ *Cole v. Saxby*, 3 Esp. 159; *Thompson v. Lay*, 4 Pick. 48, 16 Am. Dec. 325.

⁷ *Phillips v. Green*, 5 T. B. Mon. 344; *Wheaton v. East*, 5 Yerg. 41, 26 Am. Dec. 251.

⁸ *Stimson Am. Stat. L.* 4147.

⁹ *Cornwall v. Hawkins*, 41 L. J. Ch. 435, construing the similar English statute (Lord Tenterden's act); *Robinson v. Hoskins*, 14 Barb. 393.

¹ *Alabama, etc., R. Co. v. Jones*, 73 Miss. 110, 19 S. W. Rep. 105; *Tucker v. Moreland*, 10 Pet. 59, 1 Am. Lead Cas. 224; *Curtin v. Patton*, 11 Serg. & R. 305; *Turner v. Gaither*, 83 N. C. 357, 35 Am. Rep. 574; *Norris v. Vance*, 3 Rich. (L.) 164; *Baker v. Kennett*, 54 Mo. 82; *Owen v. Long*, 112 Mass. 403; *Hatch v. Hatch*, 60 Vt. 160. Other cases, however, hold that it is not necessary to a valid ratification that the party should know that he is not legally liable by reason of his infancy. *Morse v. Wheeler*, 4 Allen 570; *Ring v. Jamison*, 2 Mo. (App.) 584, 66 Mo. 424; *Clark v. Vancourt*, 100 Ind. 113, 50 Am. Rep. 774; *Bestor v. Hickey*, 71 Conn. 181, 14 Atl. 555; *Rubin v. Strangberg*, 288 Ill. 64, 122 N. E. 808.

¹ *Derrick v. Kennedy*, 4 Port. 41; *McCarthy v. Nicrosi*, 72 Ala.

and renders it valid from the beginning.² But it must be made before suit is brought.³

Suit should be brought on the old promise and if infancy is set up in defense the plaintiff should reply the ratification. This is the proper method of pleading when a contract made during infancy is subsequently ratified, although some of the cases intimate that the plaintiff might, in case the defendant has made a new promise after coming of age, declare on the new promise.⁴

§ 145. *Implied Ratification from Acts and Conduct.*

If the infant after reaching his majority accepts the consideration of his contract made during his infancy, his ratification of it will be implied, as where he has made a lease during his minority and accepts rent after reaching full age,¹ or receives interest under his agreement,² or accepts the purchase price of property sold by him,³ or receives a portion of the consideration for a mortgage of his property,⁴ or receives the proceeds of an award, pursuant to a submission of his claim to arbitration.⁵ So bringing suit on the contract after coming of age is an implied ratification,⁶ or retaining either real or personal property purchased by him during infancy

332, 47 Am. Rep. 418; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 76 Am. Dec. 209.

² *Cheshire v. Barrett*, 4 McCord 241, 17 Am. Dec. 735; *Hall v. Jones*, 21 Md. 439.

³ *Thornton v. Illingworth*, 2 Barn. & C. 824; *Hyer v. Hyatt*, 3 Cranch C. C. 276; *Freeman v. Nichols*, 138 Mass. 313.

⁴ *Hunt v. Massey*, 5 Barn. & Adol. 902; *West v. Penny*, 16 Ala. 187.

¹ *Ashfield v. Ashfield*, W. Jones 157, Latch 197, Godb. 364.

² *Franklin v. Thornebury*, 1 Vern. 132.

³ *Ferguson v. Bell's Admr.*, 17 Mo. 347; *Highley v. Barron*, 49 Mo. 103.

⁴ *Keegan v. Cox*, 116 Mass. 289.

⁵ *Jones v. Phoenix Bk.*, 8 N. Y. 228.

⁶ *Middleton v. Hodge*, 5 Bush. 478.

for an unreasonable time after coming of age,⁷ or selling or conveying the property to a third person.⁸

§ 146. *Disaffirmance Before Reaching Majority.*

An infant's personal contracts, whether executed or executory, may be disaffirmed by him either before or after he reaches his majority,¹ as for example, his sales or exchanges of personal property,² his purchases of chattels,³ his chattel mortgages,⁴ his contracts of service,⁵ or of partnership.⁶

But an infant's conveyance of realty cannot be conclusively avoided by him until he reaches full age,⁷ although it

⁷ *Boyden v. Boyden*, 9 Met. 519; *Delano v. Blake*, 11 Wend. 85, 25 Am. Dec. 617; *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Brady v. McKenny*, 23 Me. 517; *Langdon v. Clayson*, 75 Mich. 204; *Campbell v. Lindsay* (Ind. A.), 133 N. E. 751.

⁸ *Cheshire v. Barrett*, 4 McCord 241, 17 Am. Dec. 735; *Lawson v. Lovejoy*, 8 Me. 405, 23 Am. Dec. 526; *Lynde v. Budd*, 2 Paige, 191, 21 Am. Dec. 84; *Walsh v. Powers*, 43 N. Y. 21; 3 Am. Rep. 654; *Thomas v. Pulis*, 56 Mo. 211; *Uecker v. Koehn*, 21 Neb. 559, 59 Am. Rep. 849.

¹ *Dixon v. Merritt*, 21 Minn. 196; *Chapin v. Shafer*, 49 N. Y. 407; *Contra in Michigan, Lansing v. R. Co.*, 86 N. W. Rep. 147.

² *Shipman v. Horton*, 17 Conn. 481; *Carr v. Clough*, 26 N. H. 280, 50 Am. Dec. 345; *Towle v. Dresser*, 73 Me. 252; *Sparandera v. Garage, Inc.* (N. Y.), 93 N. Y. S. 392.

³ *Cogley v. Cushman*, 16 Minn. 397; *Rice v. Boyer*, 108 Ind. 472, 58 Am. Rep. 53.

⁴ *State v. Plaisted*, 43 N. H. 413; *Cogley v. Cushman*, 16 Minn. 397; *Miller v. Smith*, 26 Minn. 248, 37 Am. Rep. 407. An infant may avoid his mortgage of real estate during his minority by pleading his infancy to a suit to foreclose. *Schneider v. Staihr*, 20 Mo. 269.

⁵ *Vent v. Osgood*, 19 Pick. 572; *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777.

⁶ *Adam v. Buell*, 67 Md. 53, 1 Am. St. Rep. 379.

⁷ *Zouch v. Parsons*, 3 Burr. 1794; *Stafford v. Roof*, 9 Cow. 626; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409; *Hastings v. Dollarhide*, 24 Cal. 195; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Singer Manfg. Co. v. Lamb*, 81 Mo. 221. No case has been cited in which an infant has by himself or guardian attempted while within age to recover lands passed from him by an executed conveyance and it is probable that none such can be shown. *Cummings v. Powell*, 8 Tex. 80.

seems he may enter during his minority and enjoy the profits.⁸ The reason which permits the infant to disaffirm his contracts of a personal nature and those relating to personal property during his minority does not apply to his conveyance of land. He is amply protected while his infancy lasts by his right to enter and take the profits.

“The true rule was said to be that where the infant can enter and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but where the possession is changed, and there are no legal means to hold and regain it in the meantime, the infant, or his guardian for him, has the right to exercise the power of rescission immediately; that the common law gave no action or other means by which the mere possession of personal property could be reclaimed and held subject to the right of avoidance.”⁹

But, where an infant's contract may be avoided by him during his minority, it is never imperative, but simply a privilege which the law gives him for his protection at his pleasure. After he becomes of age he may repudiate as well as confirm any of his voidable contracts made during his minority.

§ 147. *The Right to Disaffirm.*

The infant's right to disaffirm his contracts is an absolute right paramount to all equities of other parties. Hence a purchaser of personal property from the vendee of an infant although a purchaser for value and without notice cannot hold the property as against the infant who chooses to rescind his contract of sale.¹ Nor is a *bona fide* holder of a negotiable instrument for value before maturity and without notice, protected against the plea of infancy.² But an infant's indorse-

⁸ Zouch v. Parsons, 3 Burr. 1794; Stafford v. Roof, 9 Cow, 626; Bool v. Mix, 17 Wend. 119, 31 Am. Dec. 285; contra Shipley v. Bunn, 125 Mo. 445.

⁹ Cummings v. Powell, 8 Tex. 80.

¹ Hill v. Anderson, 5 Sm. & M. 216; Carlile v. Oil Co. (Okla.), 201 P. 377.

² Howard v. Simpkins, 70 Ga. 322.

ment of a promissory note is not void; it passes title and the indorsee may recover against prior parties.³ Therefore an infant is not prevented from disaffirming his indorsement on account of the provision of the Negotiable Instruments Act that his indorsement passes title.⁴

An infant may avoid his deed of conveyance or executory contract to convey real property as against a subsequent *bona fide* purchaser from his grantee or vendee for value, and without notice of the fact of infancy.⁵ The disaffirmance of his contract is not a fraudulent act which will avoid it or render the infant liable at law as for fraud, or against which a court of equity will relieve on that ground.⁶ For although in one sense it is always a wrong and an injury for a person laboring under a disability to enter into a contract and enjoy its fruits and thereafter to repudiate it to the prejudice of the other party; yet legal fraud cannot be predicated of such conduct by a minor, where it has not been marked by any element of deceit or intentional wrong, because the right of disaffirmance is the privilege which the law attaches to the condition of disability and of this right all men are bound to take notice.⁷ That his father was present when he made the contract and approved it, does not affect the right of the infant to disaffirm.⁸

§ 148. *Disaffirmance Must Be in Toto.*

A disaffirmance or a ratification by the infant must be in *toto*; if he disaffirms or ratifies a part of the agreement he

³ Nightengale v. Withington, 15 Mass. 272, 8 Am. Dec. 101.

⁴ Murray v. Thompson, 188 S. W. 578 (Tenn.) and see note in L. R. A. 1917 B. 1174.

⁵ Mustard v. Wohlford's Heirs, 15 Gratt. 329, 76 Am. Dec. 209; Harrod v. Myers, 21 Ark. 592, 76 Am. Dec. 409; Jenkins v. Jenkins, 12 Iowa 195.

⁶ Tucker v. Moreland, 10 Pet. 59; Clamorgan v. Lane, 9 Mo. 442; Huth v. Carondelet, etc., R. Co., 56 Mo. 202.

⁷ Brantley v. Wolf, 60 Miss. 420.

⁸ Bombardier v. Goodrich, 110 Atl. 11; Indianapolis Chair Co. v. Wilcox, 59 Ind. 429.

disaffirms or ratifies it all.¹ An infant who purchases lands or chattels cannot on coming of age retain the property and repudiate his note given for the price or other agreement upon which he obtained the property.² Where he purchases land or chattels and gives back a mortgage to secure the price, he cannot avoid the mortgage without also avoiding the conveyance.³

§ 149. *Form of Disaffirmance.*

The infant need not expressly disaffirm his contract, it being enough that he does some act inconsistent with it and from which his intention not to be bound by it may be implied.¹ Some early cases hold that deeds operating under the statute of uses and statutory grants executed by infants must be disaffirmed by entry or some other act of equal notoriety with the original conveyance; a re-entry, however, not being indispensable as in case of feoffments.² The better opinion, however, is that any act of the infant unequivocally manifesting an intention to disaffirm his deed or contract, is sufficient.³

“The ancient doctrine which required the disaffirming act to be of as high and solemn a character as the act disaffirmed has no place in modern law. The disaffirming act need take no particular form or expression. The deed of a minor may

¹ *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Lynde v. Budd*, 2 Paige, 191, 21 Am. Dec. 84; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Trust Co. v. Ins. Co. (Ind. A.)*, 134 N. E. 913.

² *Kitchen v. Lee*, 11 Paige 107, 42 Am. Dec. 101; *Armfield v. Tate*, 7 Ired. (L.) 258; *Bennett v. McLaughlin*, 13 Ill. App. 349.

³ *Roberts v. Wiggin*, 1 N. H. 73, 8 Am. Dec. 38; *Dana v. Coombs*, 6 Me. 89, 19 Am. Dec. 194; *Lynde v. Budd*, 2 Paige, 191, 21 Am. Dec. 84; *Bigelow v. Kinney*, 3 Vt. 353, 21 Am. Dec. 589.

¹ *Mustard v. Wohlford*, 15 Gratt. 329, 76 Am. Dec. 209; *Roberts v. Wiggin*, 1 N. H. 8, 78 Am. Dec. 38.

² *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Voorhies v. Voorhies*, 24 Barb. 150.

³ *Drake's Lessee v. Ramsay*, 5 Ohio 251; *Long v. Williams*, 74 Ind. 115; *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Singer Manfr. Co. v. Lamb*, 81 Mo. 221.

be avoided by acts and declarations disclosing an unequivocal intent to repudiate the binding force and effect of it as a valid instrument.”⁴

A distinction is made between the nature of the acts which are sufficient to ratify an infant’s deed or other contract and those which are required to disaffirm it.

“There is reason for this distinction between the effect of acts in avoidance and that of acts of confirmation. We have seen that an infant’s deed is not void; it passes the title of the land to the grantee. Now if the deed be avoided the ownership of the land is transferred. The seisin is changed. There is fitness in a rule that title to land shall not pass by acts less solemn than a deed; that its ownership shall not be divested by anything inferior to that which conferred it. On the other hand a confirmation passes no title; it affects no change of property; it disturbs no seisin. It is therefore itself an act of a character less solemn than is the act of avoiding a deed, and it may well be effected in a less formal manner.”⁵

§ 150. *Same—Implied Disaffirmance.*

The following acts on the part of the infant have been held to show a disaffirmance, viz., a sale of personal property to one person previously mortgaged by him to another,¹ his execution of a second mortgage deed or lease of property previously mortgaged, conveyed or leased to another,² his institution after coming of age of an action to recover possession of the

⁴ *Singer Manfr. Co. v. Lamb*, 81 Mo. 225.

⁵ *Irvine v. Irvine*, 9 Wall. 617.

¹ *State v. Plaisted*, 43 N. H. 413; *State v. Howard*, 88 N. C. 650; *Chapin v. Shafer*, 49 N. Y. 407.

² *Tucker v. Moreland*, 10 Pet. 59, 1 Am. Lead. Cas. 224; *Jackson v. Carpenter*, 11 Johns. 539; *Bool v. Mix*, 17 Wend. 119, 31 Am. Dec. 285; *Peterson v. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Hastings v. Dollarhide*, 24 Cal. 195; *Corbett v. Spencer*, 63 Mich. 731; *Val-landingham v. Johnson*, 85 Ky. 288. But if the execution of the second instrument is consistent with the continued existence of the first there is no disaffirmance and it remains unaffected by it. *Singer Manfg. Co. v. Lamb*, 81 Mo. 221; *Stuart v. Baker*, 17 Tex. 417.

and previously conveyed by him,³ or his plea of infancy to a suit to enforce a contract made during infancy.⁴

§ 151. *When Disaffirmance Required—Lapse of Time.*

Some contracts are binding upon the infant unless expressly or impliedly disaffirmed; others are not binding on him unless expressly or impliedly ratified. The rule is that where an infant acquires an interest in *permanent property* to which obligations attach, or enters into a contract which involves *continuous rights and duties*, benefits and liabilities, and has taken benefits under the contract, he will be bound unless he expressly disclaims the contract. On the other hand, a promise to perform some *isolated act*, or a *contract wholly executory*, will not be binding upon the infant unless he expressly ratifies it upon coming of age.¹

Thus if an infant who has purchased chattels continues to hold them for an unreasonable time after coming of age, without any act of disaffirmance, he will be bound by his contract, for his act is of itself inconsistent with any other idea than that of ownership.² So if an infant purchases and takes a conveyance of real property, or makes an exchange of lands, or enters into an agreement to purchase land and goes into possession, he must for like reasons elect to disaffirm within a reasonable time after attaining full age, or he will be held to have ratified the transaction by his acquiescence.³

³ Drake v. Rainey, 5 Ohio 251; Webb v. Hall, 35 Me. 336; Cole v. Pennoyer, 14 Ill. 158; Harris v. Ross, 86 Mo. 89, 56 Am. Rep. 411; Craig v. Van Bibbler, 100 Mo. 584; Tunison v. Chamblin, 88 Ill. 378.

⁴ Strain v. Wright, 7 Ga. 568; Freeman v. Nichols, 138 Mass. 313; Shrock v. Crowl, 83 Ind. 243.

¹ Law v. Long, 41 Ind. 586; Boody v. McKenney, 23 Me. 517; Beardsley v. Hotchkiss, 96 N. Y. 201; Sparandera v. Garage Co. 193 N. Y. S. 392.

² Boyden v. Boyden, 9 Metc. 519; Delano v. Blake, 11 Wend. 85, 25 Am. Dec. 617; Cheshire v. Barrett, 4 McCord 241, 17 Am. Dec. 335; Lawson v. Lovejoy, 8 Me. 405, 23 Am. Dec. 526.

³ Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38; Boody v. McKenney, 23 Me. 517; Baker v. Kennett, 54 Mo. 82; Callis v. Day, 38 Wis.

Stockholders who become possessed of their shares during infancy are liable for calls which accrued while they were infants.⁴

On the same principle, where an infant held himself out as a partner, until he came of age, and then through ceasing to act as partner did nothing to disaffirm the partnership he was held liable for debts which accrued after he became of age.

“The infant by holding himself out as a partner, contracted a continual obligation and that obligation remains till he thinks proper to put an end to it. * * * If he wished to be understood as no longer continuing a partner, he ought to have notified it to the world.”⁵

One holding lands under an infant's deed has a good title, subject to be defeated only by the infant's disaffirmance of the deed.⁶ Disaffirmance of the deed must be made within a reasonable time after the infant reaches his majority; but what is a reasonable time, and whether there is any limit other than the statute of limitations, is a question upon which the authorities are in conflict. In some states the infant must avoid a deed of his lands within a reasonable time after attaining his majority or he will be bound by his acquiescence.⁷ But the rule in most of the states is that the infant is not barred by *mere acquiescence* for a shorter period than that prescribed by the statute of limitations.⁸

643; *Hook v. Donaldson*, 9 Lea 56. What is a reasonable time depends upon the circumstance of each case. *Green v. Wilding*, 59 Iowa 679, 44 Am. Rep. 696. A delay of two years has been held unreasonable. *Wright v. Germain*, 21 Iowa 585. So has four months. *Stout v. Merrill*, 35 Iowa 47.

⁴ *North Western, etc., R. Co. v. McMichael*, 5 Ex. 114.

⁵ *Goode v. Harrison*, 5 B. & Ald. 159.

⁶ *Haynes v. Bennett*, 53 Mich. 15; *Green v. Green*, 69 N. Y. 553; *Irvine v. Irvine*, 9 Wall. 617; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468; *Veal v. Forston*, 57 Tex. 482.

⁷ *Hastings v. Dollarhide*, 24 Cal. 195; *Keil v. Healy*, 84 Ill. 104, 25 Am. Rep. 434; *Sims v. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Goodnow v. Empire Lumber Co.*, 31 Minn. 468, 47 Am. Rep. 798.

⁸ *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Prout v. Wiley*, 28 Mich. 164; *Baker v. Kennett*, 54 Mo. 82; *Sims v. Everhardt*, 102 U.

§ 152. *Effect of Disaffirmance.*

The disaffirmance of an infant's contract annuls or renders it void on both sides *ab initio*.¹ If a grantor disaffirms a deed executed during infancy he may charge the grantee for rents during the entire time that he occupied the land.² If possession has passed from him, the title is revested in him by the disaffirmance and he can recover the land if it is still in the hands of the party who contracted with him, and if it has been transferred even to a *bona fide* purchaser for value he may, as we have seen, still recover it. If he has retained possession, no affirmative action on his part is, of course, required. If he sells and delivers his personal property the title is likewise revested in him on disaffirming the contract, and he is entitled to the property in whosoever hands it may be and may retake the same by an action of replevin or trover.³

Where services have been performed by a minor in partial or entire execution of an express contract, and he avoids it, he may recover the value of the services rendered.⁴

If the infant has received no benefit from the contract he may, on disaffirming, recover back any money which he may have paid, and he has the same right when he restores or offers

S. 300; Tucker v. Moreland, 10 Pet. 59, 1 Am. Lead Cas. 224; McCarthy v. Nicrosi, 72 Ala. 332, 47 Am. Rep. 418; Peterson v. Laik, 24 Mo. 541, 69 Am. Dec. 441; Wilson v. Branch, 77 Va. 65, 46 Am. Rep. 709. But lapse of time taken in connection with other circumstances, as retention of the consideration by the grantor after coming of age, standing by and seeing improvements made upon the land and the like, may amount to a ratification or estop the grantor from avoiding the deed. Irvine v. Irvine, 9 Wall. 617; Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Cresinger v. Welch, 15 Ohio 156, 45 Am. Dec. 565; Birch v. Linton, 78 Va. 584, 49 Am. Rep. 381; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

¹ Boyden v. Boyden, 9 Met. 519; Mustard v. Wohlford's Heirs, 15 Gratt. 329, 76 Am. Dec. 209; Trust Co. v. Ins. Co. (Ind. A.), 134 N. E. 913.

² French v. McAndrew, 61 Miss. 187.

³ Shipman v. Horton, 17 Conn. 481; Bailey v. Barnberger, 11 B. Mon. 113.

⁴ Gaffney v. Hayden, 110 Mass. 137; Whitmarsh v. Hall, 3 Denio 375; Derocher v. Continental Mills, 58 Me. 217.

to restore property obtained by him by virtue of the contract.⁵ Restoration is not necessary, however, if the property has been taken from him either by the vendor or some third person.⁶

And he is bound to restore if it is in his power to do so.⁷ But where he has during minority wasted or squandered the consideration, he is not required to return an equivalent, for otherwise his privilege would fail to protect him when most needed. It is to guard against the improvidence which is incident to his immaturity that the privilege of avoiding his contracts is allowed.⁸

⁵ *McCarthy v. Henderson*, 138 Mass. 310; *Shurtleff v. Millard*, 12 R. I. 272, 34 Am. Rep. 640.

⁶ *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Lemmon v. Bee-man*, 45 Ohio St. 505.

⁷ *Brandon v. Brown*, 106 Ill. 519; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329, 76 Am. Dec. 209; *Gillespie v. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445.

⁸ *Chandler v. Simmons*, 97 Mass. 508; *McCarty v. Henderson*, 138 Mass. 310; *Whitcomb v. Joslyn*, 51 Vt. 79; *Eureka Co. v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314; *Paul v. Smith*, 41 Mo. (App.) 284; *Reynolds v. McCurry*, 100 Ill. 356; and see cases cited in last note. Cases may be found in the books where it is laid down on the one side that an infant cannot avoid his contract and recover back his money or property without offering to restore the consideration which he received (*Rice v. Butler*, 160 N. Y. 578, 55 N. E. Rep. 275, reversing same case, 49 N. Y. (Supp) 494; *Johnson v. Ins. Co.*, 56 Minn. 365, and such is the rule under the English statute. *Valentine v. Canali*, 24 Q. B. D. 167), and on the other hand that the infant may disaffirm and recover back without any condition as to restoring the consideration received by him. *Napier v. Chappell*, 62 S. W. Rep. 21 (Ky.). See the cases collected in note in 18 Am. St. Rep. 587-674. Neither of these rules can stand with the law as laid down in the text, which is supported by the best considered of the adjudication on the questions. In *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. Rep. 813, an infant had purchased a bicycle on time payments. After using the bicycle (which was not a necessary) for some time he disaffirmed the contract and sued for the money he had paid. It was held that he could recover and that the defendant was not entitled to anything for the rent and use of the bicycle while it was being used by the infant. *Rice v. Butler*, *supra*, is squarely in conflict with this decision.

§ 153. *Plea of Infancy Personal to Infant.*

Infancy is a personal privilege of which no one is permitted to take advantage except the infant himself,¹ and hence a stranger to the contract cannot assert that it is not binding because entered into by an infant.² The maker of a promissory note cannot avoid payment to the indorsee on the ground that the indorser is a minor;³ in an action for enticing away the plaintiff's servant, it is no defense that the contract of service was not binding because the servant was an infant.⁴ And a conveyance, mortgage, assignment or other transfer of property by an infant cannot be attacked as invalid by his creditors on the ground of infancy.⁵

In case of the minor's death, insanity, or other disability rendering him incapable of exercising the right of election, his contract may be avoided or confirmed by his heirs,⁶ personal representative,⁷ or conservator.⁸ But the guardian of a minor cannot avoid or confirm his ward's contracts, for the reason that the election, whether to avoid or confirm, is reserved to the minor until he comes of age, and a previous determination of his right by the guardian would be inconsistent with such a privilege in the ward.⁹

The contract is binding on the other party, if he be an adult,

¹ Shropshire v. Burns, 46 Ala. 108; Hastings v. Dollarhide, 24 Cal. 195; Hines v. Seibels (Ala.), 86 S. 43.

² Baldwin v. Rosier, 1 McCrary, 384; Griffith v. Schwenderman, 27 Mo. 412; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

³ Nightingale v. Withington, 15 Mass. 272, 8 Am. Dec. 101.

⁴ Keane v. Boycott, 2 H. Bl. 511.

⁵ Kendall v. Lawrence, 22 Pick. 540; Roberts v. Wiggin, 1 N. H. 73, 8 Am. Dec. 38.

⁶ Breckenridge v. Ormsby, 1 J. J. Marsh, 236, 19 Am. Dec. 71; Veal v. Fortson, 57 Tex. 482.

⁷ Hussey v. Jewett, 9 Mass. 100; Breckenridge v. Ormsby, 1 J. J. Marsh, 236, 19 Am. Dec. 71; Tillinghast v. Holbrook, 7 R. I. 230; Hastings v. Dollarhide, 24 Cal. 195.

⁸ Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117.

⁹ Chandler v. Simmons, 97 Mass. 511, 93 Am. Dec. 177; Crymes v. Day, 1 Bailey (L.) 320.

if the infant elects not to avoid it.¹⁰ Hence while the promise of an infant to marry is not binding upon him,¹¹ the adult party to the contract is bound.

§ 154. *Torts Connected With Contracts.*

As infancy is no defense to an action of tort, it has been sometimes attempted to hold the infant liable on his contract by framing the petition in tort for negligence or fraud. But a breach of contract may not be treated as a wrong so as to make the infant liable; the wrong must be more than a misfeasance in the performance of the contract, and must be separate from and independent of it.¹ Therefore an infant is not liable to an action for fraudulently representing himself to be of full age and thereby inducing the plaintiff to contract with him,² nor for fraudulently selling property of another as his own,³ nor for a fraudulent warranty, representation or concealment on the sale of a chattel as to its condition or quality.⁴

¹⁰ Chicago, etc., R. R. v. Lammert, 19 Ill. App. 135; Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Willard v. Stone, 7 Cow. 22, 17 Am. Dec. 496.

¹¹ Rush v. Wick, 31 Ohio St. 521; Holt v. Ward Clarendieux, 2 Strange, 937; Cannon v. Alsbury, 1 A. K. Marsh, 76, 10 Am. Dec. 709; Hunt v. Peake, 5 Cow. 475, 15 Am. Dec. 475; Willard v. Stone, 7 Cow. 22, 17 Am. Dec. 496.

¹ Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659; Homer v. Thwing, 3 Pick. 492; Eaton v. Hill, 50 N. H. 235; 9 Am. Rep. 189; Freeman v. Roland, 14 R. I. 39.

² Curtin v. Patton, 11 S. & R. 309; Homer v. Thwing, 3 Pick. 492; Conrad v. Lane, 26 Minn. 389, 37 Am. Rep. 412; Burley v. Russell, 10 N. H. 184, 34 Am. Dec. 146; Contra, Kilgore v. Jordan, 17 Tex. 341; Rice v. Boyer, 108 Ind. 472, 58 Am. Rep. 53; Prahm v. Ins. Co. (N. J.), 116 A. 798.

³ Doran v. Smith, 49 Vt. 353. Where an infant, by falsely representing himself to be of full age, induces another to sell him goods, the seller cannot maintain trover against him for the goods. Slayton v. Barry, 175 Mass. 513, 56 N. E. Rep. 574.

⁴ West v. Moore, 14 Vt. 447, 39 Am. Dec. 235; Contra, Rice v. Boyer, 108 Ind. 472, 58 Am. Rev. 53.

And an infant is not liable for damages by his negligent performance of his contract.⁵

An infant who hires a chattel is not liable for any nonfeasance, or want of or failure to use care and skill, so long as he keeps within the terms of the bailment, yet if he departs from the object of the bailment and uses the article for a different purpose than that for which it was hired, he is liable as for a conversion, and if he injures the chattel by any willful and positive act, he is responsible in damages, for the injury.⁶ Where an infant hired a horse expressly for riding and not for jumping, and then lent it to a friend who jumped the horse and killed it, he was held liable; for "what was done by the defendant was not an abuse of the contract, but was the doing of an act which he was expressly forbidden by the owner to do with the animal."⁷ And an infant is liable for money or goods intrusted to and embezzled by him⁸ and for money or the proceeds of property stolen by him.⁹

(F)

MARRIED WOMEN.

§ 155. *Property Rights of Wife at Common Law.*

At common law a married woman (except in a few special cases)¹ was not capable of making a valid contract, and was

⁵ Jennings v. Randall, 8 T. R. 325; Eaton v. Hill, 50 N. H. 239, 9 Am. Rep. 189; Volpe v. Mfg. Co. (N. J.), 115 A. 665.

⁶ Homer v. Thwing, 3 Pick. 492; Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519; Eaton v. Hill, 50 N. H. 239, 9 Am. Rep. 189.

⁷ Jennings v. Randall, supra; Freeman v. Roland, 14 R. I. 39; Churchill v. White, 58 Neb. 22, 78 N. W. Rep. 369.

⁸ Peigne v. Sutcliffe, 4 McCord, 387, 17 Am. Dec. 756. See Penrose v. Curren, 3 Rawle, 351, 24 Am. Dec. 356.

⁹ Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; Elwell v. Martin, 2 Vt. 217.

¹ These cases were: 1. The wife of one civilly dead—i. e., outlawed or under conviction of felony, might contract, sue and be sued as a feme sole. Pollock Contr. 81. 2. Where the husband

therefore not liable on any agreement which she might enter into.² By marriage the husband became entitled to the rents and profits of all real estate owned by the wife at the time of the marriage, and of all such as might come to her during coverture,³ and if a child was born of the marriage his interest lasted for the whole of his life whether his wife survived him or not.⁴ As to the personal property of the wife in her possession, the husband became entitled at once on the marriage to it absolutely. He might dispose of it as he saw fit during his life, whether with or without his wife's consent; he might bequeath it by will; and after his death such property was regarded as assets of his estate, the title passing to his executors and administrators to the exclusion of the wife, though she survived him.⁵ And the wife's earnings belonged

was never within the State or has gone beyond the jurisdiction intending to desert the wife. *Gregory v. Pierce*, 4 Metc. 478; *Rhea v. Renner*, 1 Pet. 105; *Musick v. Dodson*, 76 Mo. 624; *Ayer v. Warren*, 47 Me. 217; *Rosenthal v. Mayhugh*, 33 Ohio St. 155. 3. Where the relation of husband is put an end to by divorce or a judicial separation. *Pollock*, 83; *Anson Contr.* 118. 4. A married woman might acquire contractual rights by reason of personal services rendered by her, or of the assignment to her of a chose in action. In such cases the husband might "reduce into possession" rights of this nature accruing to his wife, but unless he did this by some act indicating an intention to deal with them as his, they did not pass, like other personalty of the wife, into the estate of the husband. They survived to the wife if she outlived her husband, or passed to her representatives if she died in his lifetime. *Lawson Rights, Rem. & Pr.*, § 733. 5. By the custom of London a wife could be a sole trader on her own account, and could make valid contracts in her trade. This is the basis of the statutory law in several states, giving the wife power to trade on her own account, and securing to her the profits of the business to her sole and separate use. See article 21 *Cent. L. J.* 47.

² *Lawson Rights, Rem. & Pr.*, § 747; *Schouler H. & W.* 98; *Burton v. Marshall*, 4 Gill, 487, 45 Am. Dec. 171; *Palmer v. Oakley*, 2 Doug. 433, 47 Am. Dec. 41; *Harris v. Taylor*, 3 Sneed 536, 67 Am. Dec. 576. A husband and wife cannot contract with each other at common law. *Hendricks v. Isaacs*, 117 N. Y. 411, 15 Am. Rep. 524.

³ *Bowie v. Stonestreet*, 6 Md. 418, 61 Am. Dec. 318; *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409.

⁴ *Schouler H. & W.* 167.

⁵ *Kent's Com.* 143; *Bingham on Infancy and Coverture*, 208; *Skillman v. Skillman*, 13 N. J. Eq. 403; *Hopkins v. Carey*, 23 Miss. 54;

the husband;⁶ and so did real estate purchased with the wife's earnings during coverture.⁷

§ 156. *Her Separate Estate, in Equity.*

But whenever the husband or his representative was forced to seek the aid of a court of chancery to recover his wife's property, *i. e.*, to reduce it into his possession, the court obliged him to set apart a portion for the separate benefit of herself and her children and this was called the wife's equity to a settlement.¹ And finally it was held that not only when the husband was the suitor, but also when the wife alone petitioned for it, a court of equity would grant her the right to her equity to a settlement out of the personalty which she brought to her husband.² Equity considered that a married woman was capable of possessing property to her own use, independently of her husband; and the court of chancery gradually widened and developed this principle until it became fully settled, that however the wife's property might be acquired, whether through contract with her husband before marriage or by gift from him or from any stranger independently of such contract, equity would protect it, if duly set apart as her separate estate.³ Nor was the interposition of a trustee essen-

Carleton v. Lovejoy, 54 Me. 445; Bell v. Bell, 37 Ala. 536, 79 Am. Dec. 73.

⁶ McDavid v. Adams, 77 Ill. 155; Bucher v. Ream, 66 Pa. St. 61; Yopst v. Yopst, 51 Ind. 61; Gould v. Carleton, 55 Me. 611; McLemore v. Pinkston, 31 Ala. 266, 68 Am. Dec. 167; Jones v. Reid, 8 W. Va. 350, 29 Am. Rep. 455; Hamilton v. Booth, 55 Miss. 60, 9 Am. Rep. 500; Skillman v. Skillman, 15 N. J. Esq. 478, 82 Am. Dec. 279.

¹ 2 Kent's Com. 137; 2 Story's Eq. Jur. § 635; Glen v. Fisher, 6 Johns. Ch. 33, 10 Am. Dec. 310; Helms v. Franciscus, 2 Bland Ch. 44, 20 Am. Dec. 402; Duvall v. Bank, 4 Gill & J. 282, 23 Am. Dec. 68; Wilks v. Fitzpatrick, 1 Humph. 54, 34 Am. Dec. 618.

² Elibank v. Montalieu, 1 Smith's Lead. Cas. 464.

³ Schouler on Husband and Wife, 191; Beaufort v. Collier, 6 Humph. 487, 44 Am. Dec. 321.

tial; the court would hold the husband, a trustee for her.⁴ It was necessary, however, that the property conveyed or devised to the wife in order to be held by her as separate estate, should have been so conveyed or devised with the intention of being held by her as her separate property. But the courts looked at the intention and no particular form of words was necessary to create a separate estate.⁵

§ 157. *Contracts of Wife in Equity.*

The chancery courts, though granting and recognizing the separate estate of a married woman, for a long period refused to grant her the power of contracting debts or making contracts which would bind her separate property. Eventually, however, being pressed by the injustice of allowing her, after having solemnly and deliberately entered into an engagement for the payment of money, to continue in the enjoyment of her separate property without paying her creditors, the courts at first ventured so far as to hold, that if she made an agreement for the payment of money by a written instrument, with a certain degree of formality and solemnity, as by a bond under her hand and seal,¹ in that case the property settled to her separate use should be made liable to the payment of it; and this principle was subsequently extended to instruments of a less formal character, such as bills of exchange² or promissory

⁴ *Rech v. Cockell*, 9 Ves. 375; *Carroll v. Lea*, 3 Gill & J. 504, 22 Am. Dec. 350; *Boykin v. Ciples*, 2 Hill. Ch. 200, 29 Am. Dec. 67; *Hamilton v. Bishop*, 8 Yerg. 33, 29 Am. Dec. 101.

⁵ *Schouler on Husband and Wife*, 192; *Martin v. Bell*, 9 Rich. Eq. 42, 70 Am. Dec. 200; *Gaines v. Poor*, 3 Met. Ky. 503, 79 Am. Dec. 559; *Fox v. Jones*, 1 W. Va. 205, 91 Am. Dec. 383; *Clark v. Peck*, 41 Vt. 145, 98 Am. Dec. 573; *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692.

¹ *Hulme v. Tenant*, 1 Smith's Lead. Cas. 525; *Heatley v. Thomas*, 15 Ves. 596.

² *Stuart v. Kirkwall*, 3 Madd. 387; *Owen v. Homan*, 4 H. L. Cas. 997; *McHenry v. Davis*, L. R. 10 Eq. 88.

notes,³ then to any written agreement,⁴ and ultimately to mere verbal agreements.⁵

This rule originating with the English courts has been generally followed in the United States, where it is held that unless specially restrained by the instrument creating the separate estate, a married woman is with respect to that estate a *feme sole* in equity, and may dispose of the estate in any way she please; and a specification in the deed of settlement of particular modes in which she may dispose of the estate will not of itself restrain her from disposing of it in any other manner.⁶

§ 158. *The Wife's Statutory Estate.*

Within late years in nearly all the states, statutes have been passed making sweeping changes in the property rights of married women and their power to make contracts. These statutes, though having the same end in view, are so different in their provisions that a review of them in this place is impossible and the statutes themselves and the construction given them by the courts must be sought in the special text-books on the law of married women.¹ They provide generally that the real and personal property of a woman owned by her on her marriage shall remain her separate property free from the interference or control of her husband; that all real property acquired after marriage by the wife either by devise or descent, by purchase or gift, by her own labor or by any other

³ *Bulpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112.

⁴ *Master v. Fuller*, 1 Ves. Jr. 515; *Murray v. Barlee*, 5 Mylne & K. 209; *Picard v. Hine*, L. R. 5 Ch. App. 274.

⁵ *Matthewson's Case*, L. R. Eq. 788.

⁶ *Jaques v. Meth. Epis. Church*, 17 Johns. 549, 8 Am. Dec. 447; *Harris v. Harris*, 7 Ired. (Eq.) 11, 53 Am. Dec. 393; *Tex. Hdw. Co. v. McMahan* (Tex.), 231 S. W. 694.

¹ Especially the works of Bishop and Schouler. See also *Stewart* (Law of Husband and Wife), and *Kelly* (Contracts of Married Women). The statutes will be found well indexed in 1 *Stimson Stat. L.* 6420 et seq., and a summary of them is given in a note to *Kirkpatrick v. Buford*, 21 Ark. 268, in 76 Am. Dec. 367, 401.

manner, shall remain her sole and separate property; that all personal property acquired in the same manner shall follow the same rule, and that she may contract for all purposes and sue and be sued as fully as an unmarried woman.²

Under legislative enactments empowering a married woman to contract, a wife may make a contract with the husband to pay her for services, a thing that was impossible at common law because of her inability to make a valid contract, her lack of power being based on the fiction of the unity of husband and wife and the rule that all the wife's earnings belonged to the husband.³

§ 159. *Wife's Contracts for "Necessaries."*

The wife,¹ as agent for the husband, has an authority to bind the husband for "necessaries"² purchased by her. But this

² Wells v. Caywood, 3 Colo. 487.

³ Re Cormick, 160 N. W. 989 (Neb.).

¹ Also a reputed wife, though not married to him. Frank v. Carter, 219 N. Y. 35, 118 N. E. 549 Am. note L. R. A. 1917, B 1290.

² Lawson Rights, Rem. & Pr., § 719. "Necessaries" as in the case of an infant are such things as are necessary to her health and comfort having regard to the means and social position of husband and wife. Hall v. Weir, 1 Allen, 261; Parke v. Kleeber, 37 Pa. St. 251; Bergh v. Warner, 47 Minn. 250, 50 N. W. Rep. 77. Food, lodging, clothing, fuel and washing are within the term. So is furniture. Hunt v. DeBlaquiere, 5 Bing. 550. Jewelry suitable to her station in life. Raynes v. Bennett, 114 Mass. 424. Medicine and medical attendance. Mayhew v. Thayer, 8 Gray, 172; Carstens v. Hanselman, 61 Mich. 426, 1 Am. St. 606; Webber v. Spambake, 2 Redf. 258; Spawn v. Mercer, 8 Met. 357; Cothran v. Lee, 24 Ala. 380. Dentistry. Freeman v. Holmes, 62 Ga. 556; Gilman v. Andrus, 28 Vt. 241, 67 Am. Dec. 713. Servants. Bazeley v. Fowler, L. R. 3 Q. B. 562. A horse worth \$40 for the exercise of an invalid wife of a miller earning \$30 a month. Cornelia v. Ellis, 11 Ill. 584. A piano. Parke v. Kleeber, 37 Penn. St. 241. But the following are not "necessaries." Articles beyond the husband's means and his place in society. Caney v. Patton, 2 Ashm. 140; Phillipson v. Hayter, L. R. 6 C. P. 38. The services of a quack doctor. Wood v. O'Kelley, 8 Cush. 406. A pew in a church. St. John's Parish v. Brownson, 40 Conn. 78, 16 Am. Rep. 17. £67 worth of dry goods, outfit for a watering place, for a wife of a poor barrister. Atkins v. Curwood, 7 C. & P. 759. Bonnets, laces, feathers and ribbons, to the amount of £5,287, in part of a year. Lane v. Ironmonger, 13 M. & W. 368.

agency does not arise from the relation of the parties alone;³ it is founded on (1) *express authoritiy*, (2) *estoppel*, or (3) *necessity*.

1. Where the husband has given the wife express authority to purchase necessities upon credit, here of course he is bound, and the same result follows where he ratifies her contracts made without his authority.⁴

2. Where the husband has habitually ratified the acts of his wife in pledging his credit, he cannot, as regards those whom he has induced to look to him for payment, revoke her authority without notice.

“If a tradesman has had dealings with the wife upon the credit of the husband, and the husband has paid him without demur in respect of such dealings, the tradesman has a right to assume, *in the absence of notice to the contrary*, that the authority of the wife which the husband has recognized continues. The husband’s quiescence in such a case amounts to acquiescence, and forbids his denying an authority which his

Jewelry for the wife of a special pleader. *Montague v. Benedict*, 3 B. & C. 631. Passage money to enable wife to join husband. *Knox v. Bushell*, 3 C. & B. (N. S.) 334. A pianette. *Chappell v. Nunn*, 20 Alb. L. J. 18. £959 worth of foreign birds for the rich wife of a poor rector. *Freestone v. Butcher*, 6 C. & P. 643. A ball dress worth \$80. *Sharpley v. Doutre*, 4 Can. Leg. News, 185. Pipes, tobacco and cigars. *Bradley v. Murray*, 66 Ala. 270. Costs of divorce and other legal proceedings against the husband are held in a number of cases to be “necessaries.” *Grindell v. Godmond*, 5 Ad. & El. 755. *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637; *Porter v. Briggs*, 38 Iowa, 166, 18 Am. Rep. 27; *Warner v. Heiden*, 28 Wis. 517, 9 Am. Rep. 515; *Conant v. Burnham*, 133 Mass. 503, 43 Am. Rep. 532. While in others they are held not to be such. *Johnson v. Williams*, 3 G. Green, 97, 54 Am. Dec. 491; *Ray v. Adden*, 50 N. H. 82, 9 Am. Rep. 175; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695; *Coffin v. Dunham*, 8 Cush. 404, 54 Am. Dec. 769; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 121; *Goldberg v. Zellrer* (Tex.), 235 S. W. 870.

³ *Bergh v. Warner*, 47 Minn. 250, 50 N. W. Rep. 67; *Sauter v. Scrutchfield*, 28 Mo. (App.) 150; *Humes v. Taber*, 1 R. I. 473.

⁴ *Lawson Rights, Rem. & Pr.*, § 728; *Gilman v. Andrus*, 28 Vt. 241, 67 Am. Dec. 713; *Mackinley v. McGregor*, 3 Whart. 369, 31 Am. Dec. 522; *Segelbaum v. Ensminger*, 117 Pa. St. 248, 2 Am. St. Rep. 662.

own conduct has invited the tradesman to assume.⁵ But in the absence of such authority arising from conduct the husband is entitled as against persons dealing with his wife to revoke any express or implied authority which he may have given her, and to do so without notice to persons so dealing. The tradesman must be taken to know the law; he knows that the wife has no authority in fact or in law to pledge the husband's credit even for necessities, unless he expressly or impliedly gives it her, and that what the husband gives he may take away.⁷⁶

3. The husband being bound to maintain his wife in a manner suitable to his estate and condition, if he fail to supply that maintenance, except under certain circumstances which justify him in withdrawing it, she may be entitled from necessity to pledge his credit to that extent;⁷ nor can the husband revoke or deprive her of such authority, even by express notice to the party who supplies her.⁸ Thus if a husband by his conduct compels his wife to leave his house, she has power to pledge his credit for her necessary maintenance elsewhere.⁹ So also where he abandons her.¹⁰ And during a husband's absence from home the wife as his agent has extensive powers.¹¹

⁵ *Debenham v. Mellor*, 5 Q. B. Div. 394, 6 App. Cas. 24; *Clark v. Cox*, 32 Mich. 204; *Winnerstrom v. Kelly*, 27 N. Y. 326; *Jetley v. Hill*, 1 C. & E. 239; *Parrott v. Peacock College*, 180 S. W. 132.

⁶ *Debenham v. Mellor*, *supra*.

⁷ *Manby v. Scott*, 2 Smith's Lead. Cas. 375; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120.

⁸ *Bolton v. Prentice*, 2 Strange, 1214. *Pierpont v. Wilson*, 49 Conn. 451. "She is considered his agent with uncountermandable authority to order the necessities on his credit." *Campbell, C. J.*, in *Jenner v. Morris*, 3 De Gex, F. & J. 51.

⁹ *Houliston v. Smyth*, 3 Bing. 127; *Hancock v. Merrick*, 10 Cush. 41; *Billing v. Pilcher*, 7 B. Mon. 458, 46 Am. Dec. 523; *Mitchell v. Treanor* 11 Ga. 324, 56 Am. Dec. 421; *Senft v. Carpenter*, 18 R. I. 543, 28 Atl. 963.

¹⁰ *Eiler v. Crull*, 99 Ind. 375; *Carstens v. Hanselman*, 61 Mich. 426, 1 Am. St. Rep. 606.

¹¹ *Meader v. Page*, 39 Vt. 306; *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Krebs v. O'Grady*, 23 Ala. 726, 58 Am. Dec. 312; *Felker v. Emerson*, 16 Vt. 653, 42 Am. Dec. 532; *Casteel v. Casteel*, 8 Blackf. 240, 44 Am. Dec. 763. But see *Humes v. Taber*, 1 R. I. 464.

If the wife of her own fault desert her husband or refuse to live with him, her authority as his agent ceases.¹² But if she offer to return and he will not receive her, he becomes liable.¹³

Except in these three cases the wife cannot bind the husband for necessities supplied to her; and it will be a good defense to such a suit that she was supplied by him with necessities or had a separate allowance for their purchase.¹⁴ A husband is not liable to one who loaned money to his wife for the purchase of necessities, unless the lender furnished the necessities, or saw that the money was laid out in their purchase.¹⁵ And of course where it appears that the credit was given exclusively to the wife she and not the husband is liable.¹⁶

“Inasmuch as a married woman is now as capable of contracting *sui juris* as any other person, the first question to be considered when a married woman now makes a contract is, for whom was she contracting; was it her own personal contract, or did she make it as agent only for and on behalf of her husband? That depends on the answer to the question, to whom was the credit given, *to the understanding of both parties?* The question is one of fact depending on all the circumstances of the transaction. The nature of the contract is a

¹² *Atkins v. Pearce*, 2 C. B. (N. S.) 763; *McCutchin v. McGahay*, 11 Johns. 281, 6 Am. Dec. 373; *Bevier v. Galloway*, 71 Ill. 517; *Sturtevant v. Starin*, 19 Wis. 268; *Brown v. Mudgett*, 40 Vt. 68; *Porter v. Bobb*, 25 Mo. 36; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 78; *Thome v. Kathan*, 51 Vt. 520. So where she lives apart from him by agreement. *Alley v. Winn*, 134 Miss. 77, 45 Am. Rep. 297. *Denver Dry Goods Co. v. Jester*, 60 Colo. 290, 152 Pac. 903, and see note L. R. A. 1917, A. 758.

¹³ *Cunningham v. Irwin*, 7 S. & R. 247, 10 Am. Dec. 458.

¹⁴ *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Richardson v. Dubois*, L. R. 5 Q. B. 51; *Mott v. Comstock*, 8 Wend. 544; *Baker v. Barney*, 8 Johns. 72, 5 Am. Dec. 326; *Alley v. Winn*, 134 Mass. 77, 45 Am. Rep. 297; *Clark v. Cox*, 32 Mich. 204; *Cochran Timber Co. v. Fisher*, 190 Mich. 478, 157 N. W. 282.

¹⁵ *Marshall v. Perkins*, 20 R. I. 34, 37 Atl. Rep. 301. See *Skinner v. Tinill*, 159 Mass. 474, 34 N. E. Rep. 692.

¹⁶ *Metcalf v. Shaw*, 3 Camp. 22; *Mitchell v. Treanor*, 11 Ga. 324, 56 Am. Dec. 421. By statute both husband and wife are liable for the necessary household supplies. As to this see note to *Lewis v. France*, 163 N. W. (Minn.) in L. R. A. 1917, F. 861.

material element in determining the question to whom credit was given. And in the case of a wife's contract for necessities it will still generally be presumed, in the absence of evidence to the contrary, that she contracted as agent only. The wife, however, may herself incur liabilities even when contracting not for herself but as agent for her husband; in fact, it may be stated generally that she is in the same position as any other agent who is *sui juris*, and is subject to the same rights and liabilities. If, therefore, it were proved that she had no authority in fact to contract as agent for her husband, she would be liable to an action on the implied warranty of authority (or to an action for deceit, as the case might be), provided the other party was not aware that she had no authority. Her liability would, of course, in such a case be very different from what it would be if she could be sued on the contract itself; for the measure of damages for which her separate property would be liable would be the loss the other party had sustained through not having the contract performed, which might or might not be substantial.¹⁷

(G)

INSANE PERSONS.

§ 160. *Contracts of Insane Persons.*

The contract of an insane person is voidable at his option,¹ and one may prove, in avoidance of his contract, that he was *non compos mentis* when he entered into it,² although a sim-

¹⁷ Shirley Lead Cases 53.

¹ Lazell v. Pinnick, 1 Tyler 247, 4 Am. Dec. 722; Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119; Eaton v. Eaton, 37 N. J. (L.) 108, 18 Am. Rep. 716; Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71; Allis v. Billings, 6 Met. 415, 39 Am. Dec. 744. In a few cases it has been incorrectly held that the contract is absolutely void, and not merely voidable. Desilver's Estate, 5 Rawle 110, 28 Am. Dec. 645; Van Deusen v. Sweet, 51 N. Y. 378; Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470.

² Mitchell v. Kingman, 5 Pick 431; Grant v. Thompson, 4 Conn. 203, 10 Am. Dec. 119; Tolson v. Garner, 15 Mo. 494; Rice v. Peet, 15 Johns. 503. The contract is voidable in favor of the person of unsound mind and although he has brought on that condition by habitual drunkenness. Menkins v. Lightner, 18 Ill. 282; Bliss v. R. Co., 24 Vt. 424.

ilar privilege is not allowed to the party with whom he contracted.³ The insanity to avoid the contract must be an absolute incapacity to understand the nature and effect of the act,⁴ and, therefore, mere weakness of mind,⁵ or partial insanity or monomania, unconnected with the subject-matter of the contract,⁶ is not sufficient, though a moderate degree of incapacity may be sufficient in equity where the transaction is accompanied with fraud, imposition or duress.⁷

It has been held that one may be capable of making a will and yet incapable of making a contract, for the reason that the contractor's mind and will power necessarily come in contact with that of the other party, while the making of a will is a unilateral act and may be done without the advice, persuasion or knowledge of any other person.⁸

Where the person has been adjudged a lunatic, and placed under guardianship, contracts made by him thereafter are absolutely void.⁹ The decree of the court is conclusive on the

³ *Howe v. Howe*, 99 Mass. 98; *Rollett v. Heiman*, 120 Ind. 511, 16 Am. St. Rep. 340; *Atwell v. Jenkins*, 163 Mass. 362, 40 N. E. Rep. 178.

⁴ *Titcomb v. Vanlyle*, 84 Ill. 371; *Wall v. Hill*, 1 B. Mon. 290, 36 Am. Dec. 578; *Stewart v. Lispenard*, 26 Wend. 255; *Sands v. Potter*, 165 Ill. 397, 46 N. E. 282; *Elwood v. O'Brien*, 105 Ia. 239, 74 N. W. 740.

⁵ *Baldrick v. Garvey*, 66 Ia. 14; *Lindsey v. Lindsey*, 50 Ill. 77, 99 Am. Dec. 489; *Jackson v. King*, 4 Cow. 207, 15 Am. Dec. 354.

⁶ *Galpin v. Wilson*, 40 Ia. 90; *Marks v. Hill*, 15 Gratt. 422; *Boyce v. Smith*, 9 Gratt. 704, 60 Am. Dec. 313. As for example, a belief in spiritualism. *Connor v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84.

⁷ *Corbit v. Smith*, 7 Ia. 60, 71 Am. Dec. 431; *Rickman v. Houck*, (Iowa), 184 N. W. 657.

Persons deaf and dumb from birth are not necessarily incapable of contracting, though the presumption is against them. *Brower v. Fisher*, 4 Johns. Ch. 440; *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187.

⁸ *Jones v. Belshe*, 238 Mo. 524, 141 S. W. 1130.

⁹ *Wait v. Maxwell*, 5 Pick. 217; *Rannels v. Gerner*, 80 Mo. 477; *Elston v. Jaspar*, 45 Tex. 409; *L'Amoureux v. Crosby*, 2 Paige Ch. 422, 22 Am. Dec. 655; *Hughes v. Jones*, 116 N. Y. 67, 15 Am. St. Rep. 386; *Leonard v. Leonard*, 14 Pick. 280.

question of the ward's sanity, on the ground, *first*, that it fixes the ward's status as to all the world, and, *second*, that it would be absurd for the guardian to be compelled to litigate the question of his ward's sanity in every action brought against him or by him.¹⁰ But the disability only extends while he is in the state where the guardian was appointed. And the contracts are not void where the guardianship has been abandoned, or no guardian has been appointed, or the guardian appointed has resigned.¹¹

If a party to a contract is lacking in mental capacity the contract may be set aside by his executor or administrator on that ground.¹²

A contract or liability assumed by a person while of sound mind may be enforced against him when he is of unsound mind,¹³ and a contract made during a lucid interval is valid.¹⁴ The party may ratify the contract if he afterwards becomes sane;¹⁵ or in a subsequent lucid interval;¹⁶ or if he continues insane, his heirs, after his death, may ratify it.¹⁷

¹⁰ Willworth v. Leonard, 156 Mass. 277, 31 N. E. 299; White v. Palmer, 4 Cush. 147; Hughes v. Jones, 116 N. Y. 67, 15 Am. St. Rep. 386. It is only prima facie evidence in some states, Eagle v. Peterson, 136 Ark. 70, 2606 S. W. 55.

¹¹ Elston v. Jaspar, 45 Tex. 409; Mohr v. Tulip, 40 Wis. 66; Willworth v. Leonard, 156 Mass. 277, 31 N. E. 299. The rule that an adjudication of insanity creates a conclusive presumption of insanity which exists until there is a readjudication of the question and a reversal of setting aside of the previous decree is not followed in Kansas, where one under guardianship may be shown to have been actually sane when the contract was made. Lower v. Schumacher, 60 Pac. Rep. 538 (Kan.).

¹² See note to Wheeler v. McKeon, 137 Minn. 92, 162 N. W. 1070 in A. L. R. 1517.

¹³ King v. Robinson, 38 Me. 114, 54 Am. Dec. 614; Haggard v. Ranger, 15 Fed. 860.

¹⁴ Hall v. Warren, 9 Ves. 605; Lee v. Lee, 4 McCord 183, 17 Am. Dec. 722; Gangwere's Estate, 14 Pa. St. 417, 53 Am. Dec. 554.

¹⁵ Howe v. Howe, 99 Mass. 98; Cole v. Cole, 5 Sneed. 63, 70 Am. Dec. 275; Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514.

¹⁶ Brown v. Hodgdon, 31 Me. 67.

¹⁷ Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705.

§ 161. *Insanity Not Known to Other Party.*

It seems doubtful, even in the case of executory contracts, whether the transaction can be avoided on the ground of lunacy as against a contracting party who had no reason to suppose that he was dealing with an insane person.¹ But when such person is not under a conservator or guardian duly appointed by law, and is apparently of sound mind, and the other contracting party has no reasonable cause to believe otherwise, the contract cannot be avoided, if it is fair and has been so far performed that the other party cannot be restored to his former position.²

¹ Anson Contr., 115.

² Behrens v. McKenzie, 23 Ia. 333, 92 Am. Dec. 428; Rusk v. Fenton, 14 Bush. 490, 29 Am. Rep. 413; Lancaster Bank v. Moore, 78 Pa. St. 414, 21 Am. Rep. 24; Fay v. Burditt, 81 Ind. 433, 42 Am. Rep. 142; Flach v. Gottschalk Co., 88 Md. 368, 41 Atl. 908. In the Massachusetts case of Seaver v. Phelps, 11 Pick 304, 22 Am. Dec. 372, the contrary was held, the court saying that the fairness of the defendant's conduct could not supply the plaintiff's want of capacity. And some cases following the principle of this case hold that where the insane person received no benefit under the contract, the contract cannot be enforced against him, and if executed he may recover whatever of value he parted with, notwithstanding the other party to the contract may have acted in good faith without knowledge of the infirmity. Van Patton v. Beals, 46 Ia. 63; Northwestern Mutual Ins. Co. v. Blankenship, 94 Ind. 535; Lincoln v. Buckmaster, 32 Vt. 658. And a few cases hold that the deed of an insane person, who never recovers his reason, is void, and that in an action to recover the land by heirs it is no defense to show that his grantee purchased in good faith. Rogers v. Blackwell, 49 Mich. 192; Vandusen v. Sweet, 51 N. Y. 378; Dexter v. Hall, 15 Wall. 9; Somers v. Pumphrey, 24 Ind. 231; Hull v. Louth, 109 Ind. 315, 58 Am. Rep. 405; N. W. Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185. But Seaver v. Phillips is not law, and the rule as stated in the text is sustained by a great majority of the adjudications, and seems to be as well settled as any rule of law can be. Odom v. Reddick, 104 N. C. 515, 17 Am. St. Rep. 686; Puffer v. Hazzard (Mass.), 133 N. E. 109.

§ 162. *Contracts for Necessaries.*

The insane person is liable for necessities supplied to him even by one who had notice of his incapacity¹ and even though he is in charge of a conservator or guardian.² And his estate is liable likewise for the maintenance of his wife and family,³ and for the costs of a commission of lunacy.⁴

(H)

DRUNKARDS.

§ 163. *Contracts Made by Intoxicated Persons.*

The ancient rule was that drunkenness could not be set up to avoid a contract. "His drunkenness," said Coke, "aggravates his offense and does not derogate from the act which he did at the time." Another Equity judge said that having been in drink is not any reason to relieve a man against his contract or deed for that would be to encourage drunkenness.¹ But the modern rule looks to capacity and deems it immaterial how the incapacity was produced.

Therefore an agreement entered into with one so intoxicated as to be deprived of the exercise of his understanding is voidable, although the intoxication were voluntary, and not procured through the intervention of the other party.² Merely

¹ *Baxter v. Portsmouth*, 5 B. & C. 170; *Ingraham v. Baldwin*, 9 N. Y. 48; *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592; *Ex Parte Northington*, 37 Ala. 496, 79 Am. Dec. 67; *Montgomery Co. v. Gup-ton*, 139 Mo. 310.

² *Sawyer v. Lufkin*, 56 Me. 308; *McCrillis v. Bartlett*, 8 N. H. 569.

³ *Read v. Legard*, 6 Ex. 636.

⁴ *Williams v. Wentworth*, 5 Beav. 325.

¹ *Johnson v. Medlicott*, 3 P. Wms. 131.

² *Bush v. Brenig*, 113 Pa. St. 310, 57 Am. Rep. 469; *Burroughs v. Richman*, 13 N. J. (L.) 233, 23 Am. Dec. 717; *Holland v. Barnes*, 53 Ala. 38, 25 Am. Rep. 595; *French v. French*, 8 Ohio 214, 31 Am. Dec. 441.

being under the influence of liquor is not enough; there must be that state of excessive drunkenness which deprives the person of the consciousness of what he is doing.³

If the drunkard after becoming sober ratifies his contract it becomes binding on him,⁴ and he is liable for necessities supplied to him while intoxicated.⁵

A contract made by a drunkard, under guardianship, is void though he is proved sober when it was made;⁶ though when there has been no judicial finding or commission putting him under guardianship, an habitual drunkard may make a valid contract while sober.⁷

The other party cannot avoid his agreement on account of the intoxication,⁸ but the drunkard on rescinding his contract is obliged to restore the consideration.⁹ The drunkenness of the maker of a negotiable instrument is no defense against a *bona fide* holder for value without notice.¹⁰ And drunkenness is no defense to an action on an implied contract to repay money lent.¹¹

³ *Miller v. Finley*, 26 Mich. 254; *Caulkins v. Frey*, 25 Conn. 170; *Parker v. Marco*, 76 Fed. Rep. 510; *Wright v. Waller*, 29 South. 57 (Ala.); *Waldron v. Angleman*, 58 Atl. 568 (N. J.); *Kendall v. Ewert*, 42 S. C. T. 404.

⁴ *Matthews v. Baxter*, L. R. 8 Ex. 132; *Carpenter v. Rodgers*, 61 Med. 384, 1 Am. St. 595; *Lyon v. Phillips*, 106 Pa. St. 57.

⁵ *Gore v. Gibson*, 13 M. & W. 625.

⁶ *Wadsworth v. Sharpsteen*, 8 N. Y. 388, 59 Am. Dec. 499.

⁷ *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Van Wych v. Brosher*, 81 N. Y. 262.

⁸ *Matthews v. Baxter*, *supra*; *Carpenter v. Rodgers*, *supra*.

⁹ *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377.

¹⁰ *State Bk. v. McCoy*, 69 Pa. St. 204, 8 Am. Rep. 246; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

¹¹ *Maneklau v. Felchlin*, 57 Mo. (App.) 603; *Gore v. Gibson*, 13 M. & W. 623.

I.

AGENTS.

§ 164. *The Right to Contract by an Agent—Divisions of the Subject.*

Although it is a rule of the common law that one cannot by a contract with another confer rights or impose liabilities upon a third person, nevertheless one man may represent another by virtue of a contract of employment between them, and this employment for the purpose of representation is called a contract of agency.

Agency, for the purpose of creating contractual relations, retains no trace in the common law of its origin in *status*. Even where a man employs as his agent one who is incapable of entering into a contract with himself, as where he gives authority to his child, being an infant,¹ the authority must be given, it is never inherent. There must be evidence of intention on the one side to confer, on the other to undertake, the authority given, though the person employed may, from defective status, be unable to sue or be sued on the contract of employment.

From this general rule, we must except that form of agency known as "agency of necessity," a quasi-contractual relation formed by the operation of rules of law upon the circumstances of the parties, and not by the agreement of the parties themselves. In all other cases one cannot become the agent of another except by his authority, either express or implied.²

The rules which govern the relation of principal and agent fall under three heads:

I. The mode of forming the relation.

II. The effect of the relation when formed; under which we will consider: (1) the effect of the contract of employment

¹ See ante, § 128.

² *McGoldrich v. Willits*, 52 N. Y. 612; *Stringham v. Ins. Co.*, 4 Abb. App. Dec. 315.

as between principal and agent. (2) The rights and liabilities of the parties where the agent contracts for a named principal. Is the agent more than a mere instrument of communication; and does he incur any liabilities, and of what sort, if he exceeds his powers or asserts an authority which he does not possess? (3) The rights and liabilities of the parties where he has contracted as agent, but without disclosing his principal's name; or in his own name, without disclosing his principal's existence. What then are the relations to each other of the two real parties to the contract, and of the agent to the party who is not his employer?

III. The mode in which the relation is brought to an end, *i. e.*, the termination of the agent's authority.

(I)

THE MODE OF FORMING THE RELATION.

§ 165. *Introductory.*

The mode of forming the relation of principal and agent will be considered in reference to (a) the capacity of the parties, (b) the form of the contract of employment.

(a)

THE CAPACITY OF THE PARTIES.

§ 166. *Who May Be Principal and Agent.*

No one can appoint an agent, *i. e.*, be a principal, who is not capable of making a contract, and on the other hand, whatever a person may legally do himself, he may legally do by hand of another.¹ Therefore, persons under disabilities, as idiots, lunatics, persons *non compos mentis*, infants, mar-

¹ Weaver v. Carnall, 35 Ark. 198, 37 Am. Rep. 22; Montgomery Co. v. Robinson, 85 Ill. 174.

ried women, alien enemies and convicts are, so far as they are incapable of making contracts, incapable of being principals.²

But any one may be an agent, and it matters not that he has not in other respects the capacity to make a contract.³ The reason given for this distinction is that the execution of a naked authority can in no way be prejudicial to the person under such disability or incapacity as infancy or the like, or to any other person who by law may claim any interest of such person after his death.⁴

A person having an adverse interest cannot act as an agent in the transaction.⁵ One cannot be the agent of both parties, where their interests are adverse or incompatible,⁶ nor can one act in the same transaction for himself and for another.⁷ Yet when the double agency is with the consent of the principals it is valid.⁸ And one cannot appoint an agent to do a purely personal act.⁹ Thus a man cannot appoint an agent to marry a woman for him or to make a will for him.¹⁰ Nor where an act is required by statute to be done by the party, if it can be inferred from the nature of the act that it was intended to be personally done, can it be done by attorney or agent, as for example the making of a deed by a married woman, with the formalities of acknowledgment and private examination.¹¹ Nor can one appoint an agent to do an illegal act.¹²

² See Lawson Rights, Rem. & Pr., §§ 3-5. "While the parent of a minor is its natural guardian, he cannot be said to be the agent or attorney for the child. McDonald v. City, 285 Ill. 52, 120 N. E. 476.

³ Lyon v. Kent, 45 Ala. 656.

⁴ Evans Agency, 17.

⁵ Bain v. Brown, 56 N. Y. 285.

⁶ Hinchley v. Arey, 27 Me. 362; Sumner v. R. C., 78 N. C. 286; Greenwood v. Spring, 54 Barb. 78. See post, § 180.

⁷ Neuendorff v. Ins. Co., 69 N. Y. 389.

⁸ Lawson Rights, Rem. & Pr. §§ 7, 94.

⁹ Ex parte Ugra Bank, L. R. 6, Ch. 206.

¹⁰ Lawson Rights, Rem. & Pr., § 25.

¹¹ Storey Agency, § 12, note.

¹² Elmore v. Brooks, 6 Heisk. 45; Davis v. Barger, 57 Ind. 54; Brown v. Howard, 14 Johns. 120; State v. Mathis, 1 Hill (S. C.) 37.

(b)

THE FORM OF THE CONTRACT OF EMPLOYMENT.

§ 167. *Formation of the Contract of Agency—In General.*

The methods by which the contract of agency may be formed, are the methods by which an agreement of any kind may be formed, *i. e.*: (1) by *an offer of a promise for an act*, as where one's services are requested in such a manner as to import a promise to indemnify for any loss, risk or expense in rendering them.¹ (2) By *an offer of an act for a promise*, as where one makes a contract for another without his authority, but the latter afterwards accepts the act and ratifies it; (3) By *an offer of a promise for a promise*, as where the promises are mutual to employ and remunerate on the one side, and to do the work required on the other.

§ 168. *Form of the Contract.*

It is a rule of the common law that to authorize an agent to make a binding contract under seal it is essential that he should receive his authority by an instrument under seal.¹ American courts relax the strictness of this rule, especially in its application to partnership and commercial transactions,² and if the instrument would be effectual without a seal, the addition of a seal will not render an authority under seal necessary, but if executed under a parol authority or subse-

¹ One who undertakes to do a service for another, gratuitously, is liable only for misfeasance and not for nonfeasance. In an English case it was held a good cause of action that the defendant gratuitously undertook to effect a fire insurance for the plaintiff and by omitting some necessary formalities made it impossible for the plaintiff to recover upon the policy. No action would have lain if he had simply neglected to insure at all. *Wilkinson v. Coverdale*, 1 Esq. 75.

¹ *Lawson Rights, Rem. & Pr.*, § 13; *Schuetze v. Bailey*, 40 Mo. 69; *Preston v. Hull*, 23 Gratt. 600, 14 Am. Rep. 153; *Humphreys v. Finch*, 97 N. C. 303, 2 Am. St. Rep. 293.

² *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330.

quently ratified by parol it will be valid and binding upon the principal.³ So a deed of land made by an agent under a parol authority, though inoperative to convey the title, will in equity be regarded as evidence of a contract to convey and will bind the principal to make the conveyance.⁴ And where the deed is made by the agent *in the presence* of the principal a verbal or even an implied authority is sufficient.⁵ In all other cases it is not required that the authority should be given in any special form, either writing or words being sufficient.⁶

Formerly it was said that an authority to act as one's agent should in every instance be given by deed or other instrument under seal so that the proof of the authority would be clear and indisputable in every case. But such a rule would be clearly absurd in our day, when the multifarious transactions of commerce must be carried on with speed and without circumlocution.⁷

§ 169. *Acts and Conduct.*

The authority may also be inferred from the acts and conduct of the parties or the habits and course of business of the principal,¹ and this inference is more readily drawn when

³ Worrall v. Munn, *supra*; Dickerman v. Ashton, 21 Minn. 538; Love v. Sierra Nev. Co., 32 Cal. 639, 91 Am. Dec. 602; Despatch Line v. Bellany, 12 N. H. 205, 37 Am. Dec. 203; Drumright v. Philpot, 16 Ga. 424, 60 Am. Dec. 738.

⁴ Groff v. Ramsay, 19 Minn. 24; Schuetze v. Bailey, 40 Mo. 69; Newton v. Bronson, 13 N. Y. 593, 67 Am. Dec. 89.

⁵ Jansen v. McCahill, 22 Cal. 563, 83 Am. Dec. 84; Gardner v. Gardner, 5 Cush. 483.

⁶ Story on Agency, § 46; Long v. Colburn, 11 Mass. 97, 6 Am. Dec. 160. In some cases, the authority is required by statute to be in writing, as under the Missouri statute of frauds, where the authority of the agent to sign a memorandum for the sale of lands is required to be in writing. But under the statutes of frauds of nearly all the States this is not essential. Lawson Rights, Rem. & Pr., § 16; Kostovic v. VanBuren, 193 N. Y. S. 181.

⁷ Lawson Rights, Rem. & Pr., § 10.

¹ Mitchum v. Dunlap, 98 Mo. 419.

they stand in certain relations to each other.² Thus if a master allows his servant to purchase goods for him of another habitually, upon credit, that other becomes entitled to look to the master for payment for such things as are supplied in the ordinary course of dealing.³ So if the wife is allowed to deal with a tradesman for the ordinary supplies of the household the husband will be considered to have held her out as his agent and to be liable for her purchases.⁴ Yet there is nothing in the relations of master and servant or husband and wife to give any inherent authority to the servant or the wife. The authority can only spring from the words or conduct of the master or husband. On the other hand the contract of partnership confers on each partner an authority to act for the others in the ordinary course of the partnership business. And each partner accepts a corresponding liability for the acts of his fellows.⁵ The relations of marriage and employment, enable an authority to be readily inferred from conduct. But apart from the conduct alone may create so strong a presumption of authority that the person so acting is estopped from denying that it has been conferred.⁶ To all these cases (excepting, of course, partnership) the term agency by *estoppel* may be applied. They differ only in the greater or less readiness with which the presumption will be created by the conduct of the parties.

§ 170. *Necessity.*

Circumstances operating upon the conduct of the parties may create in certain cases agency *from necessity*. A hus-

² Story on Agency, §§ 54, 55; *Gilbraith v. Lineberger*, 69 N. C. 145.

³ *Show.*, 95.

⁴ *Debenham v. Mellor*, 5 Q. B. D. 403, *ante* § 159.

⁵ *Hawken v. Bourne*, 8 M. & W. 710; *Lawson Rights, Rem. & Pr.*, Title III.

⁶ *Farmers, etc., Bk. v. Butchers Bk.*, 16 N. Y. 145, 69 Am. Dec. 678; *Pennsylvania R. R. Co. v. Atha*, 22 Fed. 920; *Freiberg v. Beach Hotel, etc., Co.*, 63 Tex. 449; *Paine v. Tillinghast*, 52 Conn. 532.

band is bound to maintain his wife;¹ if therefore he wrongfully leave her without means of subsistence she becomes "an agent of necessity to supply her wants upon his credit."² A carrier of goods or a master of a ship may under certain circumstances, in the interest of his employer, pledge his credit or sell the goods, and will be considered to have his authority to do so.³ Here the relation of principal and agent does not arise from agreement; it is imposed by law on the circumstances of the parties.

§ 171. *Ratification.*

The relation of principal and agent may also arise by *ratification*, *i. e.*, by the party adopting and taking the benefit and liabilities of a contract made by another person on his behalf, but without his authority, ratification being equivalent to antecedent authority. For example, if A professes to enter into a contract for me without my authority, and I afterwards ratify it, my ratification relates back so as to have the same effect as if I had authorized him to enter into the contract for me.¹ But if third persons acquire rights after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to defeat those rights.²

The principal is bound by the act whether it be to his detriment or to his advantage, and whether it be in contract

¹ *Eastland v. Burchell*, 3 Q. B. D. at p. 436.

² *Eiler v. Crull*, 99 Ind. 375; *Watkins v. DeArmand*, 89 Ind. 553; *Ferren v. Moore*, 59 N. H. 106; *Pierpont v. Wilson*, 49 Conn. 450; ante, § 159.

³ *Kemp v. Pryor*, 7 Ves. 246.

¹ *Lawson Rights*, Rem. & Pr. § 29; *Drakely v. Gregg*, 8 Wall. 242; *Gulich v. Grover*, 33 N. J. (L.) 463, 97 Am. Dec. 728; *Rich v. State Bank*, 7 Neb. 201, 23 Am. Rep. 382.

² *Wood v. McClain*, 7 Ala. 800, 42 Am. Dec. 612; *Lewis v. Buttrick*, 102 Mass. 412.

or in tort.³ A ratification once made cannot be revoked by the principal.⁴ And it must be *in toto*; the principal cannot ratify one part of the agent's acts and reject the other part, for that would allow him to accept the agent's unauthorized act so far as it was beneficial to him, and to reject what was against his interest—a thing the law will not allow.⁵ Thus where A sells B's live stock, and gives a warranty of their soundness, B, by ratifying the sale and accepting the money, ratifies also the giving of the warranty.⁶

But where the ratification is made under a mistake, or in ignorance of the full extent of the agent's act it is voidable to the extent of the mistake.⁷ And the ratification is binding only where it is made with full knowledge on the part of the principal of all the material facts.⁸ But knowledge of material facts may be inferred from circumstances, and the principal may by his conduct preclude himself from denying such knowledge.⁹

The agent must have contracted for such matters as the principal had power to do, for if the agent enters into a contract on behalf of a principal who is incapable of making it or for an illegal purpose there can be no ratification.¹⁰

The agent must have made the contract *as an agent*; i. e.,

³ Wilson v. Truman, 6 M. & G. 236; Moorehouse v. Northrop, 33 Conn. 380, 89 Am. Dec. 211.

⁴ Bell v. Ryerson, 11 Ia. 233, 77 Am. Dec. 142; Hazleton v. Batchelder, 44 N. Y. 10; Beall v. January, 62 Mo. 434.

⁵ Bennett v. Judson, 21 N. Y. 238; Cochran v. Chitwood, 59 Ill. 53; Billings v. Morrow, 7 Cal. 171, 68 Am. Dec. 235.

⁶ Cochran v. Chitwood, 59 Ill. 53.

⁷ Smith v. Tracy, 63 N. Y. 79; Baldwin v. Burrows, 47 N. Y. 199; Miller v. Board of Education, 44 Cal. 166.

⁸ Bank of Owensboro v. Western Bk., 13 Bush 526, 26 Am. Rep. 211; Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516; Lester v. Kinne, 37 Conn. 9.

⁹ Scott v. R. R. Co., 86 N. Y. 200; Forbes v. Haymann, 75 Va. 158.

¹⁰ Mason v. Caldwell, 5 Gilm. 196, 48 Am. Dec. 330; O'Connell v. Arnold, 53 Ind. 105; Harrison v. McHenry, 9 Ga. 164, 52 Am. Dec. 435.

on behalf of the person who ratifies it.¹¹ If having a principal he contracts in his own name he cannot divest himself of his personal liability to have the contract enforced as against him or against his principal when discovered, at the option of the party with whom he has dealt, and if he has no principal and contracts in his own name he can only divest himself of his rights and liabilities by assignment.¹² On this ground¹³ a person cannot ratify the forgery of his name—because the forger does not act on behalf of nor profess to represent the person whose signature he counterfeits, unless the ratification is held good on the ground of estoppel.¹⁴

The agent must act for a principal who is in contemplation;¹⁵ he cannot make a contract with a vague expectation that someone will relieve him of his liabilities. But this rule does not prevent ratification in the case of brokers making contracts, as agents, in the expectation that customers with whom they are in the habit of dealing will take them off their hands. In contracts of marine insurance, persons “who are not named or ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance. But they must be persons who were contemplated at the time the policy was made.” And the principal may exist only in contemplation of law, as in the case of estates of deceased or bankrupt persons; an agent may contract on behalf of the estate, and the administrators or trustees may take advan-

¹¹ *Condit v. Baldwin*, 21 N. Y. 219, 78 Am. Dec. 137; *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315; *Aldred v. Bray*, 41 Mo. 484.

¹² *Anson Contr.*, § 336; *Hammerslough v. Cheatham*, 84 Mo. 14. See *Durant v. Roberts*, 82 L. T. Rep. 217, criticised in 34 Am. L. Rev. 783.

¹³ *Brook v. Hook*, L. R. 6 Ex. 79; *McKenzie v. British Linen Co.*, 6 App. Cas. 62; *Shisler v. Vandike*, 92 Pa. St. 447, 37 Am. Rep. 704.

¹⁴ *Forsyth v. Day*, 46 Me. 176; *Wellington v. Jackson*, 121 Mass. 157.

¹⁵ *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479; *Bevenoge v. Rawson*, 51 Ill. 594.

tage of the contract though they were not appointed or even ascertained at the time of its making.

The principal must be in existence at the time the unauthorized transaction took place.¹⁶ Thus where a person enters into a contract as promoter or trustee on behalf of a corporation not yet formed, and the company when formed adopts his acts, this is making a new contract by it, and not ratifying the existing one.¹⁷

§ 172. *Form of Ratification.*

Where there is an express assent to or an express confirmation of the transaction either by word of mouth or in writing, the proof of the ratification is not difficult, though it is to be borne in mind that if the agent's contract is required by law to be under seal then the principal's ratification must be under seal likewise.¹ But where the agent has unnecessarily affixed a seal to the contract the ratification need not be under seal.² And in all cases no formal words are essential, if it can be gathered from the contents of the instrument or the language used that an express ratification was intended.³

§ 173. *Ratification by Acts and Conduct.*

It is not necessary that the principal should declare the unauthorized act confirmed by him in so many words.¹ His

¹⁶ *Watson v. Swan*, 11 C. B. (N. S.) 771.

¹⁷ *Pratt v. Oshkosh Match Co.*, 89 Wis. 406, 62 N. W. Rep. 84; *Kelner v. Baxter*, L. R. 2 C. P. 175.

¹ *Lawson Rights, Rem. and Pr.*, § 40 and cases cited. But there are cases denying that this is requisite. *Holbrook v. Chamberlin*, 116 Mass. 115, 17 Am. Rep. 140.

² *Ledbetter v. Walker*, 31 Ala. 175; *Bates v. Best*, 13 B. Mon. 215.

³ *Story on Agency*, § 252. Where a statute, however, requires an agent's authority to sell lands to be in writing, ratification of his act must be, in such cases, in writing. *Hawkins v. McGroarty*, 110 Mo. 546.

¹ *Lovejoy v. R. Co.*, 128 Mass. 480; *Cooper v. Schwartz*, 40 Wis. 54; *Szymanski v. Plassan*, 20 La. Ann. 90, 96 Am. Dec. 382.

acts and conduct are always construed liberally in favor of the agent; and when they are inconsistent with anything else but a ratification, the presumption of ratification is almost conclusive,² and especially is this so where it was manifestly for his benefit.³ Thus silence may raise a presumption of ratification, for a principal who knows of an unauthorized act having been done in his name by his agent must give notice of his dissent within a reasonable time,⁴ though he is not required to disown the act the very instant he hears of it.⁵ So accepting the benefits of the unauthorized act⁶ (provided, of course, that the principal was aware of all the material facts);⁷ suing the party on the contract,⁸ or suing the agent for the money received,⁹ or defending an action arising out of the contract,¹⁰ have all been held to imply a ratification.¹¹

§ 174. *Declarations of Agent.*

The authority of the agent to bind the principal cannot be proved by the agent's statements as to the extent of his authority;¹ nor can an agent give himself authority to bind his

² Penn. Nav. Co. v. Dandridge, 8 Gill & J. 248, 29 Am. Dec. 543; Bryant v. Moore, 26 Me. 84, 45 Am. Dec. 97; Herold v. Trust Co. (Mo. A.), 242 S. W. 124.

³ Flemming v. Ins. Co., 4 Whart. 50, 33 Am. Dec. 33.

⁴ Lee v. Fontaine, 10 Ala. 755, 44 Am. Dec. 505; Phil, etc., R. C. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Smith v. Sheehy, 12 Wall. 358.

⁵ Miller v. Excelsior Stone Co., 1 Ill. App. 773; Walters v. Monroe, 17 Md. 150, 77 Am. Dec. 328.

⁶ Gibson v. Norway Sav. Bank, 69 Me. 579; Darst v. Gale, 83 Ill. 136; Gold Mining Co. v. Nat. Bank, 96 U. S. 640; Gulick v. Grover, 33 N. J. (L.) 463, 97 Am. Dec. 728; Mundorf v. Wickersham, 63 Pa. St. 87, 3 Am. St. Rep. 531.

⁷ See ante, § 171.

⁸ Copeland v. Ins. Co., 6 Pick. 198; Ham v. Boody, 20 N. H. 411, 51 Am. Dec. 235; Drennan v. Walker, 21 Ark. 539.

⁹ Story on Agency, § 259.

¹⁰ Lathrop v. Com. Bk., 8 Dana, 113, 33 Am. Dec. 481.

¹¹ And see illustrative cases cited on this point in Lawson Rights, Rem. & Pr., § 41, p. 48-54.

¹ Howe Machine Co. v. Clark, 15 Kan. 492; Brigham v. Peters, 1 Gray 139; Peck v. Ritchey, 66 Mo. 114; Metchum v. Dunlap, 98 Mo. 418. But an agency may be proved by the agent himself. Thayer v. Meeker, 86 Ill. 470.

principal by false statements to those with whom he deals as to the extent of his authority;² nor can a special agent enlarge his authority by such statements.³ Statements by an agent before he received authority to act or after it has been withdrawn, or not within the scope of his agency, do not bind his principal.⁴

§ 175. *Ratification Shifts Liability to Principal.*

The ratification by the principal absolves the agent from all liability and estops the principal from claiming damages against the agent for his unlawful interference.¹ The principal becomes as liable for the agent's acts as though he had originally authorized them, and all the responsibilities are shifted from the agent to the principal.² The principal may in like manner bring suit on the contract,³ and the agent becomes entitled to the same rights and compensation as if his act had been originally authorized.⁴ If an agent improperly appoints a subagent, the ratification of the acts of the subagent by the principal will bind him in the same manner as though he had originally given the agent authority to delegate the execution of his orders.⁵ But it will create no liability on the principals' part to pay for the services of the subagent.⁶

² *Stringham v. Ins. Co.*, 4 Abb. App. 315; *Grover & Baker Co. v. Polhemus*, 34 Mich. 247.

³ *Stollenwerck v. Thacher*, 115 Mass. 224.

⁴ *Clark v. Baker*, 2 Whart. 340.

¹ *Meehan v. Forester*, 52 N. Y. 277; *Owing v. Hull*, 2 Pet. 607; *Meyer v. Morgan*, 61 Miss. 21, 24 Am. Rep. 617.

² *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146; *Mason v. Caldwell*, 5 Gilm. 196, 48 Am. Dec. 330; *Violett v. Powell*, 10 B. Mon. 347, 52 Am. Dec. 548; *Hoppe v. Bank*, 193 N. Y. S. 250.

³ *Story on Agency*, § 244.

⁴ *Hopkins v. Mollineux*, 4 Wend. 465.

⁵ *Strickland v. Hudson*, 55 Miss. 235.

⁶ *Homan v. Ins. Co.*, 7 Mo. App. 22.

§ 176. *What Acts Cannot Be Ratified.*

“Where an act is beneficial to the principal and does not create an immediate right to have some other act or duty performed by a third person, but amounts simply to the assertion of a right on the part of the principal, there the rule [that the principal may ratify an unauthorized act] seems generally applicable. * * * On the other hand if the act done by such person would if authorized create a right to have some act or duty performed by a third person so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right or estate already vested in the latter, there the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it as to bind such third person to the consequences.”¹ The cases cited in illustration of this rule by Story are: the case of a lease containing a condition for determination by either party on six months’ notice, such notice being given by an unauthorized agent;² the case of a demand by one without authority on a debtor for a debt;³ a notice of dishonor of a note;⁴ and others. The ground upon which this is put is, that in these cases the advantage is all with the principal; he may play fast and loose; he may adopt the agent’s acts, if he subsequently thinks it beneficial to him, and repudiate them if otherwise. So it has been held in Louisiana that the ratification of an unauthorized contract of reinsurance or double insurance must be made before the loss occurs, or it will be of no avail.⁵

¹ Story on Agency, §§ 245, 246. See *Farmers’ Loan Co. v. R. Co.*, 83 Fed. 870; *Mayer v. Garvan*, 270 Fed. 229.

² *Buson v. Denham*, 2 Ex. 167; *Lyster v. Goldwin*, 2 Ad. & E. (N. S.) 143.

³ *Coore v. Callaway*, 1 Esp. 83; *Freeman v. Boynton*, 7 Mass. 483.

⁴ *Tindall v. Brown*, 1 Term. Rep. 167; *Stanton v. Blossom*, 14 Mass. 116.

⁵ *Alliance Ass. Co. v. State Ins. Co.*, La. Ann. 1, 28 Am. Dec. 117.

(II)

THE EFFECT OF THE RELATION.

§ 177. *Introductory.*

Having seen the modes in which the relation of principal and agent may be formed, we pass now to the effect of that relation. And the subject will be considered under three heads: A. The rights and liabilities of principal and agent *inter se*. B. The rights and liabilities of the parties where the agent contracts as agent for a named principal. C. The rights and liabilities of the parties where the agent contracts for a principal whose name or whose existence he does not disclose.

(a)

RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT INTER SE.

§ 178. *Duty of Principal to Reward and Indemnify Agent.*

The principal is bound to pay the agent such compensation or commission for the employment as may have been agreed upon between them or as may be customary in similar cases for similar services,¹ unless he is a gratuitous agent² (in which case he is in the nature of a gratuitous bailee),^{2a} or unless the value of the service performed or the express or implied understanding between the parties show that no claim for pay was intended.³ And one who acts without

¹ Mangum v. Ball, 43 Miss. 288, 5 Am. Rep. 488; Briggs v. Boyd, 56 N. Y. 289; Dexter v. Campbell, 137 Mass. 198; Fuller v. Ellis, 39 Vt. 345; Lawson Usages & Customs, § 151.

² Story on Agency, § 324; Morrison v. Orr, 3 St. & P. 47, 33 Am. Dec. 319; Morrow v. Allison, 39 Ala. 70.

^{2a} Thorne v. Deas, 4 Johns. 84; Jenkins v. Bacon, 111 Mass. 373, 15 Am. Rep. 33.

³ Id.

authority as an agent, if his acts are afterwards ratified, becomes entitled to the same compensation as if he had been duly authorized.⁴ Where the agent has agreed to leave the amount of his compensation to the principal's discretion or generosity he cannot recover more than the principal chooses to give,⁵ although if the agreement is that he is to be allowed a reasonable compensation to be fixed by his employer, he may bring his action for a reasonable compensation, if his employer neglect or refuse to fix it.⁶

But the agent can recover nothing for his services where the service was for an illegal purpose⁷ or where he has been guilty of gross neglect, unfaithfulness or fraud in the performance of his duties⁸ or has violated his instructions.⁹

He is bound likewise to indemnify the agent for all acts lawfully done in the execution of his authority.¹⁰ This extends not only to all expenses legally and properly incurred on the principal's behalf,¹¹ but to all acts done by him in the course of his agency, in which he has undertaken a liability or sustained a damage.¹² In *Howe v. Buffalo, etc., Railroad Co.*,¹³ a railroad conductor was instructed by the company not to receive for fare a certain class of tickets. A passenger having presented one of these tickets, the conductor refused to receive it and ejected the passenger. The passenger having brought suit against him and obtained judgment, it was held

⁴ *Wilson v. Dame*, 58 N. H. 382; *Beall v. January*, 62 Mo. 434.

- *Taylor v. Brewer*, 1 M. & S. 290.

⁵ *Story on Agency*, § 325.

⁷ *Trist v. Child*, 21 Wall. 441; *Harvey v. Merrill*, 150 Mass. 1.

⁸ *Fisher v. Dynes*, 62 Ind. 348; *Smith v. Crews*, 2 Mo. App. 269; *Segar v. Parrish*, 20 Gratt. 672.

⁹ *Jones v. Hoyt*, 25 Conn. 386; *Hoyt v. Shipherd*, 70 Ill. 309; *Fraser v. Wyckoff*, 63 N. Y. 445.

¹⁰ *Haas v. Ruston*, 14 Ind. (App.) 8, 42 N. E. 302.

¹¹ *White v. National Bank*, 102 U. S. 656; *Durant v. Burt*, 98 Mass. 161; *Brown v. Phelps*, 103 Mass. 313; *Beach v. Branch*, 57 Ga. 362.

¹² *Mohawk, etc., R. Co. v. Costigan*, 2 Sandf. Ch. 306; *Howard v. Clark*, 43 Mo. 344; *Grace v. Mitchell*, 31 Wis. 533, 11 Am. Rep. 613; *Tarr v. Northy*, 17 Me. 113, 35 Am. Dec. 232; *Gurney v. R. Co.*, 43 Minn. 496, 19 Am. St. Rep. 256.

¹³ 37 N. Y. 298.

that he had a right to recover against the company the amount of the judgment and the damage sustained by him in carrying out his orders.

“The plaintiff acted in good faith and in obedience to the defendant’s instructions. He supposed the company to possess the authority it assumed, and he found himself involved in a serious liability by fidelity in discharge of a duty imposed by his principal where he was wholly free from intentional wrong. * * * The court below was right in holding that the plaintiff was entitled to redress. There is an implied obligation on the part of the principal to indemnify an innocent agent for obeying his orders, where the act would have been lawful in respect to both, if the principal really had the authority which he claimed.”

The liability, however, must not have been incurred without cause or beyond the agent’s authority or instructions,¹⁴ or after his authority has been revoked;¹⁵ nor must the agent have been guilty of negligence or unfaithfulness in his agency.¹⁶ If the money advanced by the agent or the liability incurred by him, were advanced or incurred for an illegal or immoral purpose, no suit will lie by the agent against the principal for reimbursement,¹⁷ unless the agent had no knowledge of the illegality of the transaction, or his act was not a part of it.¹⁸

And the loss must have proceeded directly from the execution of the authority. An agent who should be robbed of his own money while on a journey for his principal, or should receive an injury while similarly engaged, would clearly have no recourse against his principal for indemnity.¹⁹

¹⁴ *Pickering v. Demeritt*, 100 Mass. 415; *Day v. Holmes*, 103 Mass. 397.

¹⁵ *Story on Agency*, § 349.

¹⁶ *Dodge v. Tileston*, 12 Pick. 333; *Storer v. Eaton*, 50 Me. 219, 79 Am. Dec. 611.

¹⁷ *Armstrong v. Toler*, 11 Wheat. 258; *Kennett v. Chambers*, 14 How. 38; *Graves v. Delaplaine*, 14 Johns. 146.

¹⁸ *Armstrong v. Toler*, 11 Wheat. 258; *Greenwood v. Curtis*, 6 Mass. 358, 4 Am. Dec. 145.

¹⁹ *Powell v. Trustees*, 19 Johns. 284.

§ 179. *Duties of Agent—In General.*

For a violation of those duties which the agent owes to the principal and which the principal has a right to expect of the agent, the latter is responsible for all the damages which are the natural result thereof.¹ These duties are to enter upon the performance of the agency after having accepted the employment,² to use ordinary skill and diligence in the discharge of his duties,³ to act in good faith in the interest of the principal,⁴ to obey his orders and instructions,⁵ to give notice to the principal of every fact which it is to his interest to know for his guidance,⁶ to keep regular accounts of his transactions in his principal's business,⁷ and to account to his principal for money received, goods sold and orders obtained.⁸

These duties are clear and need no extended illustration or explanation. But there are others to which a more extended discussion will not be inappropriate, viz.: The agent's duty to make no profit out of the agency beyond his compensation or commission, and his duty to perform the service in person.

¹ Price v. Keyes, 62 N. Y. 378; Dodge v. Tileston, 12 Pick. 328; Bell v. Cunningham, 3 Pet. 69.

² Lawson Rights, Rem. & Pr., § 78.

³ Myles v. Myles, 6 Bush. 237; Mitchell v. Aten, 37 Kan. 331, 1 Am. St. Rep. 231.

⁴ Holladay v. Davis, 5 Oregon, 49; Rubidoex v. Parks, 48 Cal. 215.

⁵ Clarke v. Roberts, 26 Mich. 506; Follansbee v. Parker, 70 Ill. 11; Laverty v. Snethen, 68 N. Y. 522, 23 Am. Rep. 184; Rechtscherd v. Bank, 47 Mo. 181. If he disobeys his instructions, he will be liable, even though he may have used reasonable diligence. Butts v. Phelps, 79 Mo. 302.

⁶ Clark v. Bank, 17 Pa. St. 324; Forrester v. Boardman, 1 Story, 41.

⁷ White v. Lincoln, 8 Vesey, 363.

⁸ Lawson Rights, Rem. & Pr., § 89; Souhegan Bk. v. Wallace, 61 N. H. 24.

§ 180. *Same—To Make no Personal Profit.*

The agent is bound not to make any profit out of transactions into which he may enter on behalf of his principal in the course of the employment, other than the commission or compensation agreed upon between them. Such a failure by the agent to fulfill his obligations to his principal may take place in three ways, viz.: (1) He may accept reward from the other party to the transaction in which he is engaged, and thus may acquire an interest adverse to that of his employer. In other words, he may be bribed to make a bad bargain for his principal. Or (2) he may depart from his character of agent and assume that of principal, becoming the buyer of that which he is employed to sell, or the seller of that which he is employed to buy. Or (3) he may by taking advantage of his position as agent, and through the information he receives as such, make a profit or procure an advantage for himself.

(1) This case is an obvious fraud on the principal, and it is clear that he can neither recover the money promised, nor retain it even after it is paid over to him.¹ Thus where an engineer in the employ of a railroad company was promised a commission by another company for the use of his influence with his employers to obtain an acceptance by them of a tender made by the latter company, it was held that he could not recover the amount promised.

“It needs no authority to show that even though the employers are not actually injured and the bribe fails to have the intended effect, a contract such as this is a corrupt one and cannot be enforced.”²

In another case the agent was employed to purchase a ship. The vendor had promised his broker that he should have all that he got for the ship over £8,500, and the agent purchased

¹ *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385; *Parks v. Schoellkopf*, 100 Tex. 230, 230 S. W. 704.

² *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.

the ship for his employer for £9,250, receiving from the broker by an arrangement with him the sum of £225, a part of the excess price. It was held that the employer was entitled to recover the £225 from his agent.³

(2) In this case there need be no actual fraud on the part of the agent, nevertheless it is well settled that if one is employed to buy or sell on behalf of another he may not sell to his employer or buy of him. Nor, if he is employed to bring his principal into contractual relations with others may he assume the position of the other contracting party.⁴ This rule of law is generally based on the fiduciary relation of agent and principal; the agent is bound to do the best he can for his principal; if he puts himself in a position in which he has an interest in direct antagonism to this duty, it is difficult to suppose that the special knowledge, on the strength of which he was employed, is not exercised to the disadvantage of his employer. Or it may be based on the ground that if A employs B to make a bargain for him with some third party, the contract of employment is not fulfilled if B makes the bargain for himself. The employer may sustain no loss, but he has not got what he bargained for.⁵

This fiduciary relation stands also in the way of one secretly acting as agent for both the parties to a contract when the matter requires the exercise of discretion and judgment.⁶

“The principle on which rests the well-settled doctrine that a man cannot become the purchaser of property for his own use and benefit which is intrusted to him to sell, is equally applicable when the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to

³ *Morrison v. Thompson*, L. R. 9 Q. B. 480.

⁴ *Ringo v. Binns*, 10 Pet. 269; *Smith v. Brotherline*, 62 Pa. St. 461; *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521; *Bain v. Brown*, 50 N. Y. 285; *Grunley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304.

⁵ On this second argument see *Sharman v. Brandt*, L. R. 6 Q. B. 720.

⁶ *Copeland v. Ins. Co.*, 6 Pick. 204; *Rupp v. Sampson*, 16 Gray, 398 77 Am. Dec. 416.

assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent for the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a discreet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that the vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties and is a breach of the trust and confidence intended to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them."⁷

A double agency may be undertaken with the consent of the principal and in certain cases it is customary to do so. Thus, brokers,⁸ or a middleman in an exchange,⁹ may act for both parties and receive compensation from each;¹⁰ and so of course where each party has notice that he is acting for both and each agrees to pay him a commission.¹¹

(3) The agent is not permitted to make any secret profit or advantage out of his agency, and all profits or advantages directly or indirectly made by him in the course of, or in connection with his employment whether in performance of or in violation of his duty belong to the principal.¹² He will not be

⁷ Bigelow, C. J., in *Farnsworth v. Hemmer*, 1 Allen 494, 79 Am. Dec. 756.

⁸ *Rowe v. Stevens*, 3 Jones & S. 189; *Spyer v. Fisher*, 5 Jones & S. 93.

⁹ *Mullen v. Keetzleb*, 7 Bush. 253; *Rupp v. Sampson*, 16 Gray, 398, 7 Am. Dec. 419.

¹⁰ *Alexander v. University*, 57 Ind. 466; *Lynch v. Fallon*, 11 R. I. 11, 23 Am. Rep. 458.

¹¹ *Rowe v. Stevens*, 53 N. Y. 621; *Bell v. McConnell*, 37 Ohio St. 96, 41 Am. Rep. 528.

¹² *Bain v. Brown*, 56 N. Y. 285; *Dodd v. Wakeman*, 26 N. J. (Eq.) 84; *Pegram v. Charlotte, etc., R. Co.*, 84 N. C. 696, 37 Am. Rep. 639; *Drumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202, 100 Am. Dec. 628; *Miller v. L. & N. R. Co.*, 3 Ala. 274, 3 Am. St. Rep. 722.

allowed to take advantage of information which he has acquired through his position to use it for his own benefit.¹³ In *Davis v. Hamlin*,¹⁴ an employee of a lessee of a theater, shortly before the lease expired, secretly procured a lease of the premises for a new term to himself at an advanced rent. It was held that the employer was entitled to the new lease, as he would be considered as holding it as trustee for him. Said the court:

“The renewal of the lease was obtained by a confidential agent in violation of the duty of his relation and acquired presumably because of peculiar means of knowledge of the profitability of the business afforded him by the confidential position in which he was employed. A personal benefit thus obtained by an agent equity will hold to inure for the benefit of the principal.”

§ 181. *Losses Fall on Principal.*

And because to the principal belong the profits, he must bear the losses which may occur in the course of the agency and which are not the result of the agent's lack of diligence or neglect of duty.¹

§ 182. *Agent May Not Delegate His Authority.*

The agent may not as a rule delegate to another person the power to do that which he has undertaken to do himself. *Delegata potestas non potest delegari* is a maxim of the law, for the reason that one who selects another to do an act for

¹³ *Ringo v. Binns*, 10 Pet. 269; *Norris v. Tayloe*, 49 Ill. 17, 95 Am. Dec. 568; *Pegram v. R. Co.*, 84 N. C. 696, 37 Am. Rep. 639; *Gower v. Andrew*, 59 Cal. 119, 43 Am. Rep. 242.

¹⁴ 108 Ill. 39, 48 Am. Rep. 541.

¹ *D'Arcy v. Lyle*, 5 Binney, 441.

¹ *Bozock v. Pavey*, 8 Ohio St. 270; *Warner v. Martin*, 11 How. 209; *Bissell v. Roden*, 34 Mo. 63, 84 Am. Dec. 71; *Lyon v. Jerome*, 26 Wend. 485, 37 Am. Dec. 271; *Lumber Co. v. Robertson* (Okla.), 203 P. 478.

him relies on the skill and integrity of the person selected and cannot be presumed to intend that another not selected by him should exercise the authority conferred on the man of his choice.² But the principal may authorize the delegation either directly or indirectly,³ and the authority may be implied from necessity, or the nature of the business,⁴ or from the usage of the particular trade.⁵ The delegation is likewise legal when the act delegated is a purely ministerial one and does not require the exercise of judgment and discretion.⁶ In *Weaver v. Carnell*,⁷ A authorized B to borrow money for him and sign his name to a note therefor. B borrowed the money and in his presence and at his request D signed the note in A's name. This was held valid, the court saying:

“An agent cannot delegate any portion of his power requiring the exercise of discretion or judgment; otherwise, however, as to powers and duties merely mechanical in their nature.”

Where such authority exists either expressly or impliedly and is duly exercised, privity of contract arises between the principal and the substitute and the latter becomes as responsible to the former for the due discharge of the duties which the employment casts on him as if he had been appointed by the principal himself.⁸ The agent is liable for negligence in appointing the subagent but not for his negligent acts.⁹

² Lawson Rights, Rem. & Pr., § 26.

³ Furnas v. Frankman, 6 Neb. 429; VanSchoich v. Niagara Ins. Co., 68 N. Y. 434.

⁴ Dorchester Bank v. New England Bk., 1 Cush. 177.

⁵ Lawson Usages & Customs, § 145.

⁶ Bodine v. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Grady v. Ins. Co., 60 Mo. 116.

⁷ 35 Ark. 198, 37 Am. Rep. 22.

⁸ De Bussche v. Alt, 8 Ch. Div. 310.

⁹ Warren Bk. v. Suffolk Bk., 10 Cush. 585; Tiernan v. Commercial Bank, 7 How. 648, 40 Am. Dec. 83. But see Barnard v. Coffin, 141 Mass. 37, 55 Am. Rep. 443; Morgan v. Tener, 83 Pa. St. 305.

(B)

RIGHTS AND LIABILITIES OF PARTIES WHERE PRINCIPAL NAMED.

§ 183. *Principal Bound, Agent Not.*

Where an agent acting within his authority makes a contract in the name of his principal, the latter is bound, and the agent incurs no personal liability whatever.¹ And so where one contracts with or sells goods to the agent of a known principal, the principal and not the agent is liable on the contract, and for the price.² But this rule does not apply where it is clear that the other party contracted upon the credit of the agent alone, and the principal was not either expressly or impliedly named as the person to be responsible.³

“In the common case of an upholsterer employed to furnish a house, dealing himself in only one branch of the business, he applies to other persons to furnish those articles in which he does not deal. These persons know the house is mine. That is expressly stated to him. But it does not follow that I, though the person to have the enjoyment of the articles furnished, am responsible. Suppose another case. A person instructs an attorney to bring an action who employs his own stationer (to supply him with paper) generally employed by him. The client has nothing to do with the stationer, if the attorney becomes insolvent. The client pays the attorney. The stationer, therefore, has no remedy against the client.”⁴

Where the principal is named as the contracting party, the only questions which arise are as to (a) the nature and extent

¹ Oelrichs v. Ford, 23 How. 49; Whitney v. Wyman, 101 U. S. 392; Michael v. Jones, 84 Mo. 578; Simons v. Heard, 23 Pick. 120, 34 Am. Dec. 41; Davis v. Burnett, 4 Jones 71, 67 Am. Dec. 263. An agent disclosing his agency and acting for a named principal is not liable to one who pays money to him for the principal, because he has failed to turn it over to his principal. Huffman v. Newman, 55 Neb. 713, 76 N. W. 409.

² Meeker v. Cleghorn, 44 N. Y. 349; Ferris v. Kilmer, 48 N. Y. 302.

³ Ferris v. Kilmer, 48 N. Y. 313; Meeker v. Cleghorn, 44 N. Y. 349.

⁴ Lord Erskine in Ex parte Hartop, 12 Vesey, 352.

of the agent's authority, (b) the form of the contract, (c) the rights of the parties where the agent contracts beyond his authority.

(1.)

NATURE AND EXTENT OF AGENT'S AUTHORITY.

§ 184. *General and Special Agency Distinguished.*

An agency is either general or special. A general agent is one who is authorized to transact all the business of his principal or all his business of a particular kind: a special agent is one who is authorized to act only in a particular transaction.¹ The distinction is stated by the Supreme Court of the United States thus:

“The distinction between a general and a special agency is in most cases a plain one. The purpose of the latter is a single transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract or to buy several articles from a person named, is a special agency; but authority to make purchases from any persons with whom the agent may choose to deal, or to make any indefinite number of purchases, is a general agency; and it is not the less a general agency because it does not extend over the whole business of the principal. A man may have many general agents,—one to buy cotton, another to buy wheat, and another to buy horses. So he may have a general agent to buy cotton in one neighborhood, and another general agent to buy cotton in another neighborhood. The distinction between the two kinds of agencies is that the one is created by power given to do acts of a class, and the other by power given to do individual acts only.”²

¹ Lawson Rights, Rem. & Pr. §§ 1, 56.

² Butler v. Maples, 9 Wall, 766.

The difference which arises out of this distinction is that all the restrictions upon the authority of the special agent take effect and the principal is not bound by his unauthorized acts, while in the case of a general agent all acts embraced in the delegation are valid as to third parties though directly opposed to the private instructions of the principal.³ But what is a special authority as between principal and agent may have the effect of a general authority as to third persons, the rule being that while the principal is not bound by the act of a special agent beyond his authority,—third persons in dealing with such an agent, being bound to ascertain the limits of his authority—yet, where he has held out the agent as having a larger authority than he really possesses, he will be estopped from setting up the actual terms of his authority.⁴ Therefore as to third persons the authority of the agent need not be express, but it may be implied from the performance with the knowledge of the principal of acts of a similar character.⁵

An agent to purchase or sell goods has ordinarily an implied authority to fix the price.⁶ But an agent to sell has no right to give the property away⁷ or one to purchase to agree to a price manifestly excessive.⁸

The power to employ all the usual and necessary means to

³ *Farmers Bk. v. Butchers Bk.*, 16 N. Y. 148, 69 Am. Dec. 178.

⁴ *Golding v. Merchant*, 43 Ala. 705; *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361; *Lister v. Allen*, 31 Md. 543, 100 Am. Dec. 78.

⁵ *Frieldlander v. Cornell*, 45 Tex. 585; *Edwards v. Thomas*, 66 Mo. 468; *Strickland v. Kress* (N. C.), 112 S. E. 30.

⁶ *Boulder Invest. Co. v. Fries*, 2 Colo. App. 373, 31 Pac. 174; *Bass Dry Goods Co. v. Granite City Co.*, 119 G. 124, 45 S. E. 980.

⁷ *Rogers v. Thompkins*, 87 S. W. 379 (Tex.).

⁸ *Marshall v. Kirschbraun*, 100 Neb. 876, 161 N. W. 577. As to implied authority of an agent to sell realty to bind his principal by covenants, see note to *Ayers v. R. Co.*, 173 Cal. 74, 859 Pac. 144, in L. R. A., 1917, F. And as to his implied power to make representations on the sale of land, see note to *Hodson v. Wells Co.*, 31 N. D. 395, 154 N. W. 193, in L. R. A., 1917, F. 954, 962. As to authority of agents to receive payment, see note to *Peterson v. Pacific Fisheries*, 183 Pac. 79, in 8 A. L. R. 203.

execute the authority with effect is an incident of every contract of agency,⁹ and this may be enlarged or restricted by the custom of the country or the usage of the trade or business in which he acts.¹⁰ Under extraordinary circumstances even a special agent may assume extraordinary powers.¹¹

And certain powers are recognized by the courts to be vested in certain classes of agents, as for example :

§ 185. *Auctioneers.*

An auctioneer is an agent to sell goods at a public auction.¹ He is primarily agent for the seller, but, upon the goods being knocked down, he becomes also the agent of the buyer,² and he is so for the purpose of the signatures of both parties within the fourth and seventeenth sections of the Statute of Frauds.³ He has not merely an authority to sell, but actual possession of the goods, and a lien upon them for his charges. He may sue the purchaser in his own name,⁴ and may receive payment for them.⁵ But he has no authority to purchase himself,⁶ nor to give a warranty,⁷ nor to sell on credit,⁸ nor to negotiate with the purchaser after the sale is made.⁹

⁹ *Story v. Stewart*, 9 Heisk. 137; *McAlpin v. Cassidy*, 17 Tex. 449; *Barns v. City of Hannibal*, 71 Mo. 449; *Huntley v. Mathias*, 90 N. C. 101, 47 Am. Rep. 517; *Bentley v. Doggett*, 51 Wis. 224, 37 Am. Rep. 827.

¹⁰ *Lawson Usages and Customs*, § 143, et seq.

¹¹ *Foster v. Smith*, 2 Cold. 474, 88 Am. Dec. 604; *Bartlett v. Sparkman*, 95 Mo. 136.

¹ *Lawson Rights, Rem. & Pr.*, § 212.

² *Smith v. Jones*, 7 Leigh. 165, 30 Am. Dec. 498; *Pike v. Balch*, 38 Me. 312, 61 Am. Dec. 248; *Johnson v. Buck*, 35 N. J. (L.) 338, 10 Am. Rep. 243.

³ See 12 Harv. Law Rev. 275.

⁴ *Beller v. Block*, 19 Ark. 566; *Thompson v. Kelly*, 101 Mass. 291, 3 Am. Rep. 357.

⁵ *Yourt v. Hopkins*, 24 Ill. 326.

⁶ *Story on Agency*, § 27; *Brock v. Rice*, 27 Gratt. 812.

⁷ *The Monte Allegre*, 9 Wheat. 645; *Blood v. French*, 9 Gray, 197.

⁸ *Story on Agency*, § 107.

⁹ *Pinckney v. Hagadorn*, 1 Duer, 89; *Boinest v. Leigneux*, 2 Rich. 464.

§ 186: *Factors.*

A factor is an agent to whom goods are consigned for the purpose of sale, and he has possession of the goods, authority to sell them in his own name, and a general discretion as to their sale.¹ He may sell on the usual terms of credit, may receive the price, and give a good discharge to the buyer.²

§ 187. *Brokers.*

A broker is an agent employed to make bargains and contracts between other persons in matters of trade and commerce.¹ Not having the possession of the goods he has not the wide authority of a factor.²

§ 188. *Del Credere Agents.*

A *del credere* agent is an agent for the *purpose of sale*, and in addition to this gives an undertaking to his employer that the parties with whom he is brought into contractual relations will perform the engagements into which they enter. He does not guarantee the solvency of these parties or promise to answer for their default; his undertaking does not fall within the Statute of Frauds, but is rather a promise of indemnity to his employer against his own inadvertence or ill-fortune in making contracts for him with persons who can not or will not perform them.¹

§ 189. *Foreign Principal.*

In England in the case of an agent of a foreign principal the rule was that the credit was presumed to be given to the

¹ Lawson Rights, Rem. & Pr., § 227.

² Id.

¹ Evans on Agency, § 4; Story on Agency, § 28.

² Lawson Rights, Rem. & Pr., § 224.

¹ See note to 58 Am. Dec. 171.

agent even where the principal was known.¹ The American courts after some hesitancy refused to apply this rule where the principal was simply a "foreigner" in the sense of residing in another State of the Union.² And the well-established doctrine at the present day both in England³ and America is that the agent of a foreign principal is not, as matter of law, bound, but that the Court will look at all the circumstances.⁴ In *Bray v. Kettell*,⁵ a contract was entered into in New York for the sale of stone by the agent of A. F., who lived in New Brunswick, and was signed "A. F." by K., "agent," and it was held that K. was not bound.

"The question is to whom credit was in fact given. When the goods are sold, it is certainly reasonable to suppose that the vendor trusted to the credit of a person residing in the same country with himself, subject to the laws with which he is familiar and to process for the immediate enforcement of debt, rather than to a principal residing abroad, under a different system of laws and beyond the jurisdiction of the domestic forum. But even in such a case the fact that the principal is resident in a foreign country, is only one circumstance entering into the question of credit and is liable to be controlled by other facts. So in the case of a written contract; it depends on the intention of the parties. But this as in all other cases of written instruments, must be determined mainly by the terms of the contract. There may be cases where the language of the contract is ambiguous, and it is doubtful to whom the parties intended to give credit, in which the circumstance that the principal is resident abroad may be taken into consideration in determining the question of the liability of the agent."

¹ *Thompson v. Davenport*, 9 Barn. & C. 78, except where the contract provided that the agent should not be bound; *Ogleby v. Yglesas*, 1 El. B. & E. 930; *Pederson v. Lotinga*, 28 L. T. Rep. 267.

² *Taintor v. Prendergast*, 3 Hill 72, 38 Am. Dec. 618; *Kirkpatrick v. Stainer*, 22 Wend. 254.

³ *Green v. Kopke*, 18 Com. B. 549; *Armstrong v. Stokes*, L. R. 7 Q. B. 603.

⁴ *Oelricks v. Ford*, 23 How. 49.

⁵ 6 Allen, 80.

§ 190. *Irresponsible or Non-Existent Principal.*

Where he acts for an irresponsible principal—a principal against whom the creditor can not proceed personally—the agent will be liable even though he contract as agent for a known and described principal.¹ Thus where the defendant signed a note “as guardian of B,” the court said:

“As an administrator cannot by his promise bind the estate of the intestate, so neither can the guardian by his contract bind the person or estate of his ward. Unless, therefore, the defendant is liable to pay this note, the plaintiff has no remedy.”²

The rule is the same in the case of a non-existent or inchoate principal,³ such as a voluntary unincorporated association of individuals or a meeting or organization for some temporary public or private purpose.⁴ Thus where the members of a committee appointed by a political meeting ordered a dinner for the party, in holding them personally liable for its cost, the court said:

“It will not be pretended that nobody was responsible to the plaintiff for the order; and, if the defendants were not, who else was? Were they to be viewed as the agents of a club, we would have something palpable to deal with. The question would be whether they had become personally liable by having exceeded their authority, or whether they had not contracted on the credit of their constituents. But a club is a definite association, organized for indefinite existence; not an ephemeral meeting, for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct, and we are not to imagine that the plaintiff consented to look

¹ Thacher v. Dinsmore, 5 Mass. 299, 4 Am. Dec. 61; Blakely v. Benecke, 59 Mo. 193.

² Forster v. Fuller, 6 Mass. 59, 4 Am. Dec. 87.

³ Codding v. Munson, 52 Neb. 580, 72 N. W. Rep. 846.

⁴ Phoenix Ins. Co. v. Burkett, 72 Mo. (App.) 1; Lewis v. Tilton, 64 Iowa 420.

to a body which had lost its individuality by the dispersion of its members in the general mass.”⁵

§ 191. *Agent Can Not Sue—Principal May.*

An agent contracting as such, for a named principal, can not sue upon a contract so made.¹ The party with whom he contracted has presumably looked to the named principal, and can not, unless he so choose, be made liable to one with whom he dealt merely as a means of communication. In addition to this he, the principal, is the nominal as well as the real party to the contract² when he made the contract in his own name for an undisclosed or unnamed principal,³ or where he has a special interest in the contract as a factor or an auctioneer.⁴ But this right of the agent is subordinate to and controllable by the principal, who may generally supersede the right of the agent to sue by suing in his own name.⁵

But the principal can not bring the suit:

(1) Where the contract has been exclusively with the agent, for every man has a right to determine for himself what parties he will deal with and if the other party has expressly dealt with the agent to the exclusion of the principal he can not be made liable to the principal.⁶ Thus a principal can not enforce a guarantee made to an agent where there was nothing to show that he was acting for an undisclosed principal and the guarantor had no knowledge that the credit was to be extended to the principal.⁷

⁵ *Eichbaum v. Irons*, 6 W. & S. 867.

¹ *Taintor v. Prendergast*, 3 Hill 72, 28 Am. Dec. 618; *Bayley v. Ins. Co.*, 6 Hill. 476, 41 Am. Dec. 759.

² *Sharp v. Jones*, 18 Ind. 314.

³ *Ludwig v. Gillespie*, 105 N. Y. 653.

⁴ *Lawson Rights*, Rem. & Pr., § 124.

⁵ *Sadler v. Leigh*, 4 Camp. 194; *Foster v. Graham*, 166 Mass. 202, 44 N. E. Rep. 129; *Sullivan v. Shailor*, 70 Conn. 733, 40 Atl. Rep. 1054.

⁶ *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93.

⁷ *Barnes v. Barrow*, 61 N. Y. 39; *Wilson v. Childress*, 2 Tex. App. Civ. Cas. 374.

(2) Where skill, solvency or any personal quality of the agent is a material matter in the contract. Thus in a recent case the defendant agreed to sell his property to one D the consideration being a sum in cash and D's notes secured by a trust deed on the property. The plaintiff sued for specific performance and it appeared that D was his agent in making the contract. But it was held that he could not bring the action because *his* notes and *his* deed of trust were not what the defendant had bargained for.⁸

(2.)

FORM OF THE CONTRACT.

§ 192. *Authority Must Be Executed in Name of Principal.*

The common law rule was that to bind the principal the agent must execute his authority in the name of the principal and not in his own.¹ This rule though still applied with most of its strictness to instruments under seal,² has as to other kinds of writings been much relaxed, and it may be laid down that if the name of the principal appear in such an instrument and the intention on the whole is to bind him, he will be bound though the agent sign only his own name;³ especially is this the case as to commercial contracts, negotiable paper and the like, the modern rule as to these being that if from the whole instrument it can be collected that the intention was to bind the principal, this construction will be

⁸ Kelly v. Thuey, 102 Mo. 529. Though this case seems to be overruled in 143 Mo. 424, the application of the principle to the facts is perfectly correct.

¹ Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Abbey v. Chase, 6 Cush. 54.

² Lawson Rights, Rem. & Pr., § 100.

³ New England Ins. Co. v. DeWolf, 8 Pick. 56; Robertson v. Pope, 1 Rich. 501, 44 Am. Dec. 267; Andrews v. Estes, 11 Me. 267, 26 Am. Dec. 521.

adopted though the agent may not have used apt words to do so.⁴

Merely signing a contract as "agent" will not prevent it from being a personal contract of the agent, the word "agent" in such a case being regarded as mere *descriptio personae*.⁵ Thus A signs a note "A, agent" or "A, vestryman Grace church" or "A, trustee" or "A, treasurer," or the like, in these cases A is bound personally and he cannot show that he was intending to bind some one else.⁶

§ 193. *Agent May Bind Himself Personally.*

An agent, known as such, may if he pleases, bind himself personally.¹

"A person who is acting for another,² and known by him with whom he deals to be so acting, may and will be personally liable if he contracts as a principal, and that whether he contracts by word of mouth or in writing. The difference is that if the contract is by word of mouth it is not possible to say from the agent using the words 'I' and 'me' that he meant to bind himself personally; whereas, if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is, that he binds himself personally, and accordingly he is taken to do so. It is well settled that an agent is responsible though known by the other party to be an agent, if by the terms of the contract he makes himself the contracting party."

⁴ *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558; *Rice v. Gove*, 22 Pick. 158, 33 Am. Dec. 724; *Hartzeli v. Crumb*, 90 Mo. 630. See 19 Cent. L. J. 182.

⁵ *Pentz v. Stanton*, 10 Wend. 271, 25 Am. Dec. 558; *Davis v. England*, 141 Mass. 587.

⁶ *Williams v. Robbins*, 16 Gray 77, 77 Am. Dec. 396; *Tilden v. Barnard*, 43 Mich. 376, 38 Am. Rep. 197.

¹ *Simonds v. Heard*, 23 Pick. 125, 34 Am. Dec. 41; *Southard v. Stutevant*, 109 Mass. 390.

² *Williamson v. Barton*, 31 L. J. (Ex.) (N. S.) 174.

§ 194. *Liability of Agent Who Contracts Without Authority.*

Though there are decisions that an agent is personally liable on a contract which he makes in the name of another without his authority,¹ they are clearly wrong, for it is not the business of courts to make contracts for parties which neither of them intended to make.² The agent's liability, in such a case, is either upon an implied warranty of authority when he acts in good faith, or upon the ground of fraud when he intentionally misrepresents his authority.³ The party contracted with has the right on learning the facts to repudiate the contract and to hold the assumed agent immediately responsible for damages, without waiting for the time when an action would lie on the contract itself, and the damages are to be measured not by the contract but by the injury resulting from the agent's want of power.⁴

But the agent is not always liable on this warranty of authority, where he *bona fide* believes that he has, though this seems to be the doctrine of the leading English case.⁵ If he contracts honestly, fully disclosing all the facts touching his authority, so that the other person is informed of the authority claimed by him, he does not become personally liable if it turns out that he really had no authority. But if he carelessly assumes to act without being authorized, or conceals the true state of his authority so that the party contracting is induced to rely on the assumption of the authority, he will be liable.⁶ For example A says to B: "This is my authority from C to act for him; you can take it for what it is worth,"

¹ Weaver v. Gove, 44 N. H. 106; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169.

² See White v. Madison, 26 N. Y. 117.

³ White v. Madison, 26 N. Y. 117; Duncan v. Niles, 32 Ill. 532, 83 Am. Dec. 293; Collen v. Wright, 8 El. & Bl. 647.

⁴ White v. Madison, 26 N. Y. 117; Bird v. Daggett, 97 Mass. 494.

⁵ Collen v. Wright, 8 El. & Bl. 647.

⁶ Newman v. Sylvester, 42 Ind. 106; Tiller v. Spradley, 39 Ga. 35; Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429.

and B thinks it sufficient, and there is no concealment on A's part, here the latter can not be held on any implied warranty of authority.⁷ And for the same reason when the agent's authority has been revoked by the death of the principal unknown to both parties, the agent is not liable.⁸

But of course where the professed agent knew that he had not the authority he assumed to possess, he may be sued by the injured party for the damage suffered by him from the fraud, *i. e.*, the making of a representation false to his knowledge.⁹

To render the agent liable it is essential that the unauthorized contract was one which would have bound the principal had the authority existed.¹⁰ Thus¹¹ where A, falsely representing himself as authorized to do so by B, made a parol contract for the lease of B's store to C, for the term of two years and C thereupon incurred expense in procuring fixtures for the store, but the contract was not binding on B, even if A had been authorized, it was held that no action lay against A for the damage. And where the principal is liable notwithstanding the agent's want of authority, no action will lie against the agent.¹² Thus¹³ an agent of a corporation was authorized to sign "all notes and business paper of the corporation." He gave accommodation notes for other purposes in the corporation's name, which passed into the hands of a *bona fide* holder for value. It was held that notwithstanding his want of authority, the corporation was liable on the notes and the agent could not be sued.¹⁴

⁷ See Wharton on Agency, § 530.

⁸ *Smout v. Illberry*, 10 M. & W. 1.

⁹ *Polhill v. Walter*, 3 B. & Ad. 114; *Oliver v. Morawetz*, 97 Wis. 332, 72 N. W. 877.

¹⁰ *Baltzen v. Nicolay*, 53 N. Y. 467; *Bozza v. Rowe*, 30 Ill. 198, 83 Am. Dec. 184; *Thilmany v. Iowa Paper Bag Co.*, 79 N. W. Rep. 261 (Ia.).

¹¹ *Dung v. Parker*, 52 N. Y. 494.

¹² *Landan v. Proctor*, 39 Vt. 78.

¹³ *Bird v. Daggett*, 97 Mass. 494.

¹⁴ *Ballou v. Talbot*, 16 Mass. 461, 8 Am. Dec. 146.

So if the agent's unauthorized act is ratified by the principal, he can not be personally held.¹⁵

(C)

RIGHTS AND LIABILITIES OF PARTIES WHERE PRINCIPAL NOT NAMED.

§ 195. *Liability Where Principal Unnamed but Agency Disclosed.*

Where an agent contracts as agent but does not disclose the name of his principal, the rights and liabilities of agent and principal as regards the other party to the contract depend on the construction of its terms. It may be stated generally that a person who describes himself as an agent in the contract and signs himself as such, protects himself from personal liability even though the name of his principal is not given.¹ But as the word "agent" attached to a signature is regarded as merely *descriptio personae*,² it is better that the agent should (if he desires to avoid a personal responsibility) disclose the name of his principal and declare that he is acting for him.³

§ 196. *Liability Where Agency Undisclosed.*

If the agent acts on behalf of a principal whose existence he does not disclose, the other contracting party may hold and look to the agent personally and is entitled on discovering who the principal is to elect whether he will treat principal or agent as the party with whom he dealt. If A enters into a contract with B he is entitled at all events to the liability of the party with whom he supposes himself to be contracting.¹

¹⁵ Sheffield v. Ladue, 16 Minn. 288, 10 Am. Rep. 145.

¹ Feet v. Murton, L. R. 7 Q. B. 126.

² Williams v. Robbins, 16 Gray 77, 77 Am. Dec. 396; De Witt v. Walton, 9 N. Y. 571.

³ Murphy v. Helmrich, 66 Cal. 69; Wheeler v. Reed, 36 Ill. 82.

¹ Benshouse v. Abbott, 11 Vroom, 531, 46 Am. Rep. 789.

If he subsequently discovers that B is in fact the representative of C he is entitled to choose whether he will accept the actual state of things, and sue C as principal, or whether he will adhere to the supposed state of things upon which he entered into the contract, and continue to treat B as the principal party to it.² But nothing must have occurred in the meantime to alter the relations of the parties, and the creditor must not have been guilty of laches.³

And this right of the other contracting party to avail himself of this alternative liability can not be exercised (a) where the agreement is in such terms that the idea of agency is incompatible with the construction of the contract;⁴ (b) where the other party to the contract, after having discovered the existence of the undisclosed principal, does anything unequivocally indicating that he adopts either principal or agent as the party liable to him;⁵ (c) where knowing at the time of a sale the principal and that the buyer is a mere agent, he gives the credit to the agent.⁶ But it is held that the other party must have actual knowledge, means of ascertaining the fact not being enough;⁷ nor is it sufficient that the seller knew that the buyer was an agent, if he did not know who the principal was.⁸

² Haas v. Ruston, 14 Ind. App. 8, 42 N. E. 302; McClellan v. Parker, 27 Mo. 162; Malone v. Morton, 84 Mo. 436.

³ Rathborn v. Tucker, 15 Wend. 488; Hooper v. Robinson, 97 U. S. 528.

⁴ As where an agent in making a charter-party described himself therein as owner of the ship it was held that he could not be regarded as agent, that his principal could not intervene, nor could, by parity of reasoning, be sued. Humble v. Hunter, 12 Q. B. 310.

⁵ That is to say, he can elect only once which one he will hold. Jones v. Aetna Ins. Co., 14 Conn. 501; Kingsley v. Davis, 104 Mass. 178; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51.

⁶ Here he can only sue the agent. Paterson v. Gandasequi, 15 East. 62; Raymond v. Crown Mills, 2 Metc. 324; Paige v. Stone, 10 Metc. 160.

⁷ Raymond v. Crown Mills, 8 Metc. 324; Cobb v. Knapp, 71 N. Y. 348, 27 Am. Rep. 51.

⁸ Thompson v. Davenport, 9 B. & C. 78; Irvine v. Watson, 5 Q. B. Div. 107.

§ 197. *Liability for Frauds and Torts.*

The principal is liable for the frauds, deceits and negligent acts of his agent in the course of his employment, whether authorized by him or not.¹ A man is equally liable for the negligence of his coachman who runs over a foot passenger in driving his master's carriage from the house to the stables, and for the fraud of his agent who, being instructed to obtain a purchaser for certain goods, obtains one by false statements as to the quality of the goods.² But if the person employed act beyond the scope of his employment he no longer represents his employer to bind him by tort or contract.³

To invoke the doctrine against a principal that "he who comes into Equity must come with clean hands" knowledge of the agent's bad conduct must be brought home to the principal.⁴

As to the agent's liability it may be laid down that if the agent commits a wrong in the course of his employment, he is liable, and so is his principal, while if he commits a wrong outside the scope of his authority, he is liable, but not his principal.⁵ On the other hand, as to acts of mere negligent omission, whereby another person is injured, the agent is not personally responsible. Under the maxim *respondeat su-*

¹ *Lobdell v. Baker*, 1 Metc. 199, 35 Am. Dec. 358; *Durst v. Burton*, 47 N. Y. 147, 7 Am. Rep. 428; *Mundorff v. Wickersham*, 63 Pa. St. 87, 3 Am. Rep. 531; *Wright v. Calhoun*, 19 Tex. 420; *Kline v. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282; *Regg. v. Buckley Newball Co.*, 13 N. Y. S. 172; *Johnson v. R. Co.*, 82 W. Va. 692, 97 S. E. 189.

² *Anson Contr.*, p. 254.

³ *Udell v. Atherton*, 7 H. & N. 172; *Cantrell v. Colwell*, 3 Head, 471; *Feneram v. Singer Co.*, 47 N. Y. S. 284; *McGrath v. Michaels*, 81 Id. 109; *Hardeman v. Williams*, 150 Ala. 418, 43 South 726; *Steinman v. Baltimore Co.*, 109 Md. 62, 71 Atl. 517.

⁴ *Associated Press v. International News*, 240 Fed. 983, 248 U. S. 215.

⁵ *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437; *Jenne v. Sutton*, 43 N. J. (L.) 257, 37 Am. Rep. 578; *Sprights v. Hawley*, 39 N. Y. 441, 100 Am. Dec. 452; *Hadden v. Griffin*, 136 Mass. 229, 49 Am. Rep. 25.

perior, the principal is liable for the injury, with a right over against the agent.⁶

The distinction may be illustrated by two cases: In the first an agent having the care of the real estate of a non-resident owner neglected to keep the floor of one of the buildings in repair, whereby a person was injured. It was held that the agent was *not* personally liable.⁷ In the second case a similar agent negligently directed water to be let into the house, and the pipes being out of repair, the tenant was damaged. It was held that the agent *was* personally liable.⁸

(III)

THE TERMINATION OF THE AGENT'S AUTHORITY.

§ 198. *Introductory.*

An agent's authority may be terminated and the agency brought to an end in any of three ways: 1. By agreement of both parties. 2. By the act of one of the parties. 3. By operation of law.

§ 199. *By Agreement.*

At any time in the course of the agency the parties may by express agreement rescind the contract of agency. So where the agency is limited to a definite object or a definite time, the

⁶ *Colvin v. Holbrook*, 2 N. Y. 120; *Delaney v. Rochereau*, 34 La. App. 1123, 44 Am. Rep. 457; *Brown Paper Co. v. Dean*, 123 Mass. 207; *Labadie v. Hawley*, 61 Tex. 178, 48 Am. Rep. 278; *Utilities Co. v. Sav. Co.* (Ark.), 237 S. W. 707.

⁷ *Delaney v. Rocherau*, 34 La. Ann. 1123, 44 Am. Rep. 456, and note in L. R. A., 1917, C. 83.

⁸ *Bell v. Josslyn*, 8 Gray, 309, 64 Am. Dec. 741. As to liability of an electric light company for injuries to the servants of its patrons, see note to *Mulligan v. Meridan Light Co.*, 83 South. 816, in 9 A. L. R. 174. The principal may recover from a third person money of his which his agent has lost in gambling. *Becker v. Fitch*, 167 Pac. 202; *Burnham v. Fisher*, 25 Vt. 514.

performance of the object or the expiration of the time dissolves it.¹

§ 200. *By Act of One of the Parties.*

The principal may at any time before its performance revoke the authority of his agent at his pleasure,¹ whether or not the contract of agency is for a fixed time and even though the appointment expressly states that it is irrevocable,² though of course where the contract of agency is not at the will of the principal, as to time, the principal will be liable to the agent in damages.³ And though the agent is appointed under seal his authority may be revoked by parol.⁴

The revocation may be implied as well as expressed—as for example, appointing another person to do the same act.⁵ Giving a general power to the agent where he before had only a special power will revoke the latter,⁶ though giving an additional power to one of two agents will not revoke the authority of the other.⁷ Where a person sent a note to a bank for collection and afterwards demanded it back,⁸ and where a man employed another to sell some property for him and afterwards sold it himself,⁹ it was held that the authority had been revoked.

¹ Moore v. Stone, 40 Iowa, 259; Reid v. Latham, 40 Conn. 454; Schlater v. Winpenny, 75 Pa. St. 321; Short v. Millard, 68 Ill. 292; Gundbach, v. Fisher, 59 Ill. 172; Todd v. Superior Court, 184 Pac. 684; Harris v. McPherson (Conn.), 115 A. 723.

² Peacock v. Cummings, 46 Pa. St. 434; Wells v. Hatch, 43 N. H. 247; Chambers v. Seay, 73 Ala. 372; Pulley v. Pulley, 271 Fed. 57.

³ Knapp v. Alvord, 10 Paige, 205, 40 Am. Dec. 241; Blackstone v. Buttemore, 53 Pa. St. 266.

⁴ Rowan Co. v. Hull, 47 S. E. Rep. 92 (W. Va.).

⁵ Pickler v. State, 18 Ind. 216; Brookshire v. Brookshire, 8 Ired 74, 47 Am. Dec. 341.

⁶ Copeland v. Ins. Co., 6 Pick. 108; Wallace v. Gould, 91 Ill. 15; Reid v. Latham, 40 Conn. 452.

⁷ Rapier v. Ins. Co., 57 Ala. 101.

⁸ Cushman v. Glover, 11 Ill. 600, 52 Am. Dec. 461.

⁹ Potter v. Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273.

¹⁰ Toole v. Thiele, 25 La. Ann. 418.

The agency may be dissolved by the renunciation of the agent,¹⁰ or by his misconduct.¹¹ But the agent, by renouncing it before the end of the term, will be liable for such damages as the principal may suffer thereby.¹²

§ 201. *By operation of Law.*

The dissolution of the relation of principal and agent may occur (a) by the death of the principal; (b) by death of the agent; (c) by the bankruptcy of the principal; (d) by the bankruptcy of the agent; (e) by marriage; (f) by the insanity of the principal; (g) by the insanity of the agent; (h) by the destruction of the subject-matter of the agency; (i) by war; or (j) by other special circumstances.

(a) *The death of the principal* revokes the agent's authority.¹

This rule, however, only applies to acts which must be done in the name of the principal, and not to those which the agent may do in his own name.² And the authority of a subagent which comes from the principal is not affected by the death of the agent from whom he received the appointment.³

(b) *The death of the agent* terminates the agency,⁴ and when the authority is given to two the death of one terminates

¹⁰ Case v. Jennings, 18 Tex. 661; Barrows v. Cushway, 37 Mich. 481.

¹¹ Henderson v. Hydraulic Works, 9 Phila. 100; Care v. Jennings, 17 Tex. 661.

¹² Gill v. Middleton, 105 Mass. 479; White v. Smith, 6 Lans. 5.

¹ Johnson v. Wilcox, 25 Ind. 182; Darr v. Darr, 59 Ia. 81; Jenkins v. Atkins, 1 Humph. 294, 34 Am. Dec. 649; McDonald v. Black, 20 Ohio, 185, 55 Am. Dec. 448; Hunt v. Rousmaniere, 8 Wheat. 174; Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; Jones v. Beall, 19 Ga. 171; Dailey v. Doherty (Mass.), 129 N. E. 678.

² Lawson Rights, Rem. & Pr., § 46; Dick v. Page, 17 Mo. 234, 57 Am. Dec. 267.

³ Smith v. White, 5 Dana. 376.

⁴ Merrick's Estate, 8 W. & S. 402; Jackson Ins. Co. v. Partee, 9 Heisk. 296.

it as to the other also.⁵ But the death of an agent does not generally affect the authority of a subagent.⁶

(c) *On the bankruptcy of the principal* the authority of the agent ceases, and he has no authority after that to receive or pay the principal's money.⁷ It is otherwise, however, as to property or rights which do not pass from the bankrupt by the bankruptcy, but continue to remain in him.⁸

(d) *The bankruptcy of the agent* dissolves the agency,⁹ except as to the execution of mere formal acts which pass no interest.¹⁰

(e) *The marriage of the principal* has been held to revoke the agency in the case of an authority given by a *feme sole*,¹¹ and where a single man gave a power of attorney to sell his home, it was held revoked by his marriage.¹² But the *marriage of the agent* does not affect the agency.¹³

(f) *The insanity of the principal* revokes the agency,¹⁴ provided that it was of the degree which would prevent him from making a valid contract.

(g) *The insanity of the agent* revokes the authority, as it could not be imagined that a principal could intend to be represented by one unable to contract for himself.¹⁵

(h) *Whenever the subject-matter itself* or the principal's

⁵ Hartford Ins. Co. v. Wilcox, 57 Ill. 180; Martine v. Ins. Co., 62 Barb. 181, 53 N. Y. 339, 13 Am. Rep. 529.

⁶ Smith v. White, 5 Dana, 376.

⁷ Evans' Agency, 89; Re Daniels, 13 Nat. Bk. Reg. 46; Parker v. Smith, 16 East 384.

⁸ Story on Agency, § 482; Wharton on Agency, 98. See Rice v. Barnard, 127 Mass. 241.

⁹ Audenried v. Betteley, 8 Allen 302.

¹⁰ Story on Agency, § 486; Evans' Agency, § 92.

¹¹ McCann v. O'Fewall, 8 C. & F. 30; Charnley v. Winstanley, 5 East. 26.

¹² Henderson v. Lord, 46 Tex. 628.

¹³ Story on Agency, § 485; Wharton on Agency, § 108.

¹⁴ Motley v. Head, 43 Vt. 633; Matthlessen v. McMahon, 38 N. J. (L.) 537.

¹⁵ Story on Agency, § 407; Evans' Agency, 100.

power over it ceases or goes out of existence, the agency is at an end.¹⁶ Thus if the agent is commissioned to sell a ship which is subsequently destroyed by fire, or a race horse which dies, in all these cases his authority is at an end.¹⁷ So, where the inhabitants of a town authorized the treasurer to borrow money to pay a certain tax, but the tax was subsequently adjusted without the loan, it was held that the authority of the agent to borrow ceased thereon.¹⁸ Where a person employs several agents to sell his land, and one of them sells it, this is a revocation of the authority of the others.¹⁹ So, where an agent is employed to sell property and sells it to himself, it is a revocation.²⁰ So, although a guardian may appoint an agent to act for his ward, on the coming of age of the ward the authority would be revoked.²¹

(i) *War* between the country of the principal and that of the agent terminates the agency according to some authorities;²² while according to others it does not.²³

(j) The dissolution of a partnership revokes an agency,²⁴ or a change in the firm by the admission of new partners;²⁵ but not a mere change in the firm name.²⁶ The authority of an attorney at law is not terminated by the dissolution of the partnership of which he is a member,²⁷ though it is held to be at an end by his removal or suspension from his office of at-

¹⁶ *Gilbert v. Holmes*, 64 Ill. 548; *Bissell v. Terry*, 69 Ill. 184.

¹⁷ *Evans' Agency*, 100.

¹⁸ *Benoit v. Conway*, 14 Allen 528.

¹⁹ *Ahern v. Baker*, 34 Minn. 98.

²⁰ *Toole v. Thiele*, 25 La. Ann. 418.

²¹ *Wharton Agency*, § 100.

²² *Simonton v. Clark*, 65 N. C. 525, 6 Am. Rep. 752; *Blackwell v. Willard*, 65 N. C. 555, 6 Am. Rep. 749.

²³ *Maloney v. Stephens*, 11 Heisk. 738; *Robinson v. Int. Ins. Co.*, 42 N. Y. 54, 1 Am. Rep. 400.

²⁴ *Schlater v. Wipenny*, 75 Pa. St. 321.

²⁵ *Callanan v. Van Vleck*, 36 Barb. 324.

²⁶ *Billingsly v. Dawson*, 27 Iowa, 210.

²⁷ *Weeks Attorneys*, § 191; *Lawson Rights, Rem. & Pr.*, § 164.

torney,²⁸ or by his ceasing to act as attorney or to reside in the state.²⁹

§ 202. *Time at Which Revocation Takes Effect.* ...

A revocation by the principal of the agent's authority takes effect as between principal and agent at the moment the agent receives notice of it,¹ but as to third persons it has no effect until it is made known to them.²

When an agent's authority has been withdrawn, but parties owing the principal pay their debts to the agent, not knowing of the revocation, the payments bind the principal.³

But where the agent is a special one having authority to do only a particular act, notice to third parties of the revocation is not necessary.⁴ And third persons have no right to conclude that a new agency has been established after they have been notified by the principal that the former agency has ceased, from the fact that the agent is conducting business as formerly.⁵

As to the time when the revocation by the death of the principal takes effect, the rule, as established by the great weight of authority, is that the revocation is instantaneous both as to the agent and third parties, even as to acts of the agent

²⁸ Weeks Attorneys, § 248.

²⁹ Chautauqua Bk. v. Risley, 6 Hill, 375; Jones v. U. S., 15 Ct. of Cl. 240.

¹ Story on Agency, § 740; Neile v. U. S., 7 Ct. of Cl. 525. A letter, for example, written by his principal revoking the agency is received by the agent on Wednesday, though it was written and mailed on Monday. The agency is not dissolved until Wednesday. Robertson v. Cloud, 47 Miss. 208.

² Tier v. Lampson, 35 Vt. 179, 82 Am. Dec. 634; Van Dusen v. Star Min. Co., 47 Cal. 571, 95 Am. Dec. 209; Diversy v. Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Barkley v. R. Co., 71 N. Y. 205; Lamothe v. R. Co., 17 Mo. 204; Beard v. Kirk, 11 N. H. 398; Fellows v. Hartford Steam. Co., 38 Conn. 197.

³ Packer v. Hinckley, 122 Mass. 484; Ins. Co. v. McCain, 96 U. S. 84.

⁴ Watts v. Kavanaugh, 25 Vt. 34.

⁵ Van Dusen v. Mining Co., 36 Cal. 571, 95 Am. Dec. 210.

before he obtains knowledge of the decease.⁶ This doctrine has been much criticised.⁷ The effect is to leave the third party without a remedy upon contracts entered into by the agent when ignorant of the death of his principal. The agent is not personally liable, as having contracted on behalf of a non-existent principal; for the agent had once received an authority to contract. Nor is he liable on a warranty of authority for he had no means of knowing that his authority had determined. Nor is the estate of the deceased liable; for the authority was given for the purpose of representing the principal and not his estate. The case seems a hard one, but so the law stands in most of the states. In a few states, however, the more reasonable rule is adopted that acts *bona fide* executed by the agent before notice of his death, and which do not require to be done in the principal's name, are valid in favor of innocent parties.⁸

As to persons who have dealt with an agent in ignorance of his principal's insanity, the courts incline to uphold such transactions and consider them binding upon the principal.⁹ And an agent who knowing that the principal was insane continued to exercise an authority once given by him, might be sued on a warranty of authority.¹⁰

⁶ Clayton v. Merritt, 52 Miss. 353; Rigg v. Cage, 2 Humph. 350, 37 Am. Dec. 559; Smout v. Iberry, 10 M. & W. 1; Clark v. Courtney, 5 Pet. 319; Long v. Thayer, 149 U. S. 520; Farmers Loan Co. v. Wilson, 34 N. E. 784.

⁷ See an able article in 6 Cent. L. J. 385.

⁸ Cassiday v. McKenzie, 4 W. & S. 282, 39 Am. Dec. 76; Cariger v. Whittington, 26 Mo. 311; Ish v. Crane, 8 Ohio St. 520. And see Bank v. Vanderhorst, 32 N. Y. 553. By statute in several states payments made to an agent in ignorance of the principal's death are valid. See Coney v. Saunders, 28 Ga. 511.

⁹ Davis v. Lane, 10 N. H. 156; Morley v. Head, 43 Vt. 633; Matthiessen v. McMahon, 38 N. J. L. 537; see Drew v. Nunn, L. R. 4 Q. B. 689.

¹⁰ Anson Contr., 360.

§ 203. *Authority Coupled With Interest or on Consideration.*

All the modes of revocation of authority which we have just examined apply only to mere naked powers over which the principal has absolute control, and not to powers coupled with an interest or such as are made upon sufficient consideration or for the mutual benefit of the parties.¹ It is laid down as a general rule that an authority coupled with an interest is not revocable either by the act of the principal,² or by his death,³ bankruptcy,⁴ marriage,⁵ or insanity,⁶ or in any other mode. As to what amounts to an interest it is said:⁷

“Where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. That is what is usually meant by an authority coupled with an interest and which is commonly said to be irrevocable.”

An assignment of property in trust to be distributed among creditors,⁸ a power to collect a debt to secure advances made by the agent,⁹ an authority to collect and distribute money,¹⁰ an authority given to an agent to pay to a third party a debt which he owes to his principal, or to sell property and pay himself a debt due to him out of the proceeds, are instances

¹ *Wassel v. Reardon*, 11 Ark. 705, 54 Am. Dec. 245.

² *Hartley's Appeal*, 33 Pa. St. 212; *Walker v. Dennison*, 86 Ill. 142; *Goodman v. Bowden*, 54 Me. 424; *Hunt v. Rousmaniere*, 8 Wheat. 174.

³ *Merry v. Lynch*, 68 Me. 94; *Bonney v. Smith*, 17 Ill. 531; *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274.

⁴ *Story on Agency*, § 483.

⁵ *Story on Agency*, § 483; *Eneu v. Clark*, 2 Pa. St. 234, 44 Am. Dec. 191.

⁶ *Matthiessen v. McMahon*, 38 N. J. 536.

⁷ *Smart v. Saunders*, 5 C. B. 875. See 12 Harv. L. Rev. 262.

⁸ *Ward v. Lewis*, 4 Pick. 521; *Watson v. Bageley*, 12 Pa. St. 164, 21 Am. Dec. 595; *Furman v. Fisher*, 4 Cold. 626, 94 Am. Dec. 210.

⁹ *U. S. v. Jarvis*, Daviess 274; *Speal v. Gardner*, 16 La. Ann. 383.

¹⁰ *Watson v. Bageley*, 12 Pa. St. 164, 15 Am. Dec. 595.

n which an interest has been held to be coupled with the authority so as to make it irrevocable.¹¹

But the advantage which the agent may derive from a continuance of the authority, or the inconvenience, or even the loss which he may suffer by its revocation, is not an "interest" within this rule.¹² It must be something beyond the mere compensation out of the proceeds or for the services to be rendered.¹³

¹¹ *Wheeler v. Slocum*, 16 Pick. 52.

¹² *Wheeler v. Knaggs*, 8 Ohio 169; *Chambers v. Seary*, 73 Ala. 372; *Hutchins v. Hebbard*, 34 N. Y. 24.

¹³ *Blackstone v. Buttermore*, 53 Pa. St. 266; *Walker v. Dennison*, 86 Ill. 142; *State v. Walker*, 88 Mo. 279; *Rowan Co. v. Hull*, 47 S. E. 92 (W. Va.); *Todd v. Superior Court*, 184 Pac. 684; *Chambers v. Seary*, 73 Ala. 372.

CHAPTER VI.

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§ 204. *Consent of Parties Essential.*

To a binding contract it is essential that there should be consent on the part of both parties to enter into contractual relations, and though it appears on the face of the contract that the parties did so consent, as where the words used by them clearly show consent to be present, nevertheless the law will look between this for the purpose of discovering whether such apparent consent is a real consent, and if it is found that it is not so, will avoid the contract at the suit of the innocent party.

This apparent but not real consent may arise from five causes: (A) It may arise from MISTAKE, as where one of the parties did not mean the same thing as the other one, or where one or both, while meaning the same thing, formed untrue conclusions as to the subject-matter of the agreement. (B) It may arise from MISREPRESENTATION, as where one of the parties was led to form untrue conclusions respecting the subject-matter of the contract by statements innocently made, or facts innocently withheld by the other. (C) It may arise from FRAUD, as where the untrue conclusions formed by one of the parties were induced by representations of the other party made with a knowledge of their untruth and with the intention of deceiving. (D) It may arise from DURESS, as where the apparent consent of one of the parties was extorted from him by the other by actual or threatened personal violence. Or (E) it may arise from UNDUE INFLUENCE, as where the relations of the parties were such that one of them was incapable of resisting the will of the other.

A.

MISTAKE.

§ 205. *Agreement Presumed from Assent.*

A man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence or oppression.¹ The law judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them, the acceptor of an offer has a right to believe that the offerer means what he says; and the offerer has the right to understand that the acceptance was according to the terms of the offer.²

§ 206. *From Signing or Accepting Written Instrument.*

One who signs a written contract is not permitted to show that he did not read the document or did not know of or intend to agree to its terms.¹

“A written contract is the highest evidence of the terms of an agreement between the parties to it, and it is the duty of every contracting party to learn and know its contents before he signs and delivers it. He owes this duty to the other party to the contract, because the latter may, and probably will, pay his money and shape his action in reliance upon the agreement. He owes it to the public which, as a matter of public policy, treats the written contract as a conclusive answer to the question, what was the agreement? If one can read his contract, his failure to do so is such gross negligence that it will estop him from denying it, unless he has been dissuaded from reading it by some trick or artifice practiced by the opposite party. If he cannot read it, it is as much his duty to procure some reliable person to read

¹ Bordon v. Richmond, etc., R. Co., 113 N. C. 570, 18 S. E. 392; Robertson v. Smith, 11 Tex. 211, 60 Am. Dec. 234.

² Drew v. Edmonds, 60 Vt. 401, 6 Am. St. Rep. 122; ante, § 4.

¹ 9 Cyc., 389; 13 C. J. 370.

and explain it to him, before he signs it, as it would be to read it before he signed it if he were able to do so; and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents. This is a just and salutary rule, because the other contracting party universally acts and changes his position on the faith of the contract; and it would be gross fraud upon him to permit one, who has received the benefits of the agreement in silence, to escape from its burdens by proof that he did not know and did not inquire what these burdens were, when he assumed them.”²

So where one accepts a paper which he knows contains the terms of an offer, he will be bound by it, and cannot be heard to say that he did not read it or did not know what it contained,³ as in the case of bills of lading, express receipts, insurance policies and the like.⁴

§ 207. *Mistake in Motive or Expectations.*

Where a person is mistaken in his motive in entering into an agreement or in his expectations respecting it, such mistake does not affect its validity.¹ For example, if one purchase an article, believing it will answer a particular purpose to which he intends to put it, and it fails to do so, or thinking that he needs it when he really does not, he is bound just the same to his agreement.² Where a man desiring to become a freeholder of Essex contracted to purchase a house which he believed to be in that county, but which proved to be in another, it was held, nevertheless, that he was bound.³

² Sanborn, J., in *Chicago, etc., R. Co. v. Belliwith*, 83 Fed. Rep. 437

³ See ante, § 4.

⁴ *Lawson Bail.*, § 147.

¹ *Adams v. Weare*, 1 Bro. Ch. 567; *Jeffreys v. Fairs*, 4 Ch. D. 448; *Rice v. Grange*, 131 N. Y. 149; *Anderson v. May*, 50 Minn. 280.

² *Chanter v. Hopkins*, 1 H. & H. 337; *Re British, etc., Tel. Co.*, L. R. 14 Eq. 316; *Coates v. Buck*, 93 Wis. 128, 67 N. W. 23; *Western Savings Bk. v. Bank*, 10 Bush 669.

³ *Shirley v. Davis*, cited in *Drewe v. Hanson*, 6 Ves. Jr. 675, 7 Id. 270.

“A promise to pay a given sum for property, or for information which the promisor supposed that he needed, at the time of the making of the promise, surely does not become voidable because of a subsequent discovery that the property or the information was not needed. Whether a contract rests upon a valuable consideration or otherwise must be determined by conditions as they exist when it is made; and, if the promisor supposes that the thing which he seeks to obtain and promises to pay for will be beneficial to him, he cannot avoid his promise on the strength of a subsequent discovery that it was really nonessential, or of no value.”⁴

§ 208. *Mistake in Value or Quality.*

Mistake regarding the value or quality of the subject-matter of the agreement does not avoid it.¹ Where A had found a small stone and sold it to B for one dollar, which he paid, but it turned out to be a rough diamond worth \$700, both parties—however, being ignorant at the time of the character of the stone and its intrinsic value, it was held that the sale was valid.² So where A sold B a promissory note, both of them ignorant of the fact that the makers of the note a few hours before the sale had made an assignment of all their assets for the benefit of creditors, this did not affect the sale, because:

“To produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality or other collateral attributes is not sufficient if the thing delivered is existent and is the iden-

⁴ Thayer, J., in *Casserleigh v. Wood*, 119 Fed. Rep. 311.

¹ 9 Cyc. 395; 13 C. J. 375; *Costello v. Sykes*, 172 N. W. 907 (Minn.).

² *Wood v. Boynton*, 64 Wis. 265, 54 Am. Rep. 610. In *Sherwood v. Walker*, 66 Mich., 568, the defendant had sold to plaintiff a blooded cow for the sum of \$80, both parties to the contract supposing the cow was barren. Before the time for delivery arrived defendant discovered that the cow was with calf, whereupon he rescinded the sale and declined to deliver. As a breeder the cow was worth from \$750 to \$1,000. The court held that the mistake of the parties avoided the agreement. *Sherwood, J.*, dissented on the ground that the mistake was merely as to the quality of the thing sold and this view is clearly the correct one. See *Kowalke v. R. Co.*, 103 Wis. 472, 79 N. W. Rep. 207.

real thing in kind which was sold. . . . The subject-matter of the contract was the note of J. & S. B. Sachs. The note delivered was the same note which the parties bought and sold. They may both have understood that the makers were solvent whereas they were insolvent; but such a mistake or misapprehension affects the value of the note and not its identity.”³

The same result attaches where the mistake is not mutual *—as where one through error in computation and neglecting to take into consideration certain features of the work offers to erect a building for too small a sum,⁵ or where a station agent, on application of a shipper for the rate of freight, quotes, through a mistake in the instructions to him, a lower rate than he was instructed to offer⁶ and the other party accepts the smaller or lower sum not knowing of the mistake. The same is true where one of the parties is mistaken as to the value of a thing sold, the other party knowing its real value, for here as we shall see the law requires a man to use his own judgment and if he is mistaken in thinking it better or worse than it actually is, he has no remedy unless he has insisted on a warranty or the other party has made false representations.⁷

Where the value or quality or other attribute of the subject of the agreement is doubtful, and it appears that the par-

³ *Hecht v. Batcheller*, *supra*.

⁴ *Crane v. McCormick*, 92 Cal. 176, 28 Pac. 222; *Comer v. Granniss*, 101 Ga. 277; *Griffin v. O'Neill*, 48 Kan. 117, 29 Pac. 143; *Ionides v. S. Co.*, L. R. 6 Q. B. 674; *Scott v. Littledale*, 8 E. & B. 815.

⁵ *Moffett, etc., Co. v. Rochester*, 91 Fed. 28, 33 C. C. A. 319; *Brown v. Levy*, 69 S. W. 255 (Tex.); *Griffin v. O'Neill*, 48 Kan. 117, 29 Pac. 143; *contra*, *Board of School Commrs. v. Bender*, 72 N. E. 155 (Ind.). In two recent cases, a court of equity relieved the contractor where the acceptor had not altered his position and was not injured. *Barlow v. Jones*, 87 Atl. 649 (N. J.); *St. Nicholas Church v. Kropp*, 160 Minn. 500 (Minn.). Aliter where the mistake was caused by his own carelessness and inattention. *Leonard v. Howard*, 67 Oreg. 203, 115 Pac. 549.

⁶ *Borden v. R. Co.*, 113 N. C. 570, 18 S. E. 392.

⁷ See *post*, §§ 22, 231.

ties contracted on the basis of this risk, the agreement is valid notwithstanding the mistake.⁸

§ 209. *Mistake Preventing Formation of Contract.*

Nevertheless, where the mistake is of such a nature that there is absence of mutual consent to the apparent contract, there is no agreement at all, for, as we have seen, the principle is elementary that to constitute an agreement, the parties must assent to the same thing in the same sense; the minds of both must meet as to the same thing.¹ Mistake of this kind does not simply make the agreement voidable or unenforceable, but prevents any agreement at all.²

This kind of a mistake may be considered under three heads: (A) Concerning the nature of the agreement. (B) Concerning the person with whom it is made. (C) Concerning its subject-matter.

§ 210. *Concerning Nature of Transaction.*

Where a person by mistake enters into a different kind of agreement than that which he intended, there is no contract¹—as for example where he signs a bond which he believes to be only a petition,² or which he thought he was simply

⁸ Valley City Milling Co. v. Prange, 81 N. W. 1074 (Mich.); Hood v. Todd, 58 S. W. 783 (Ky.); Eastman v. St. Anthony Falls Water Power Co., 24 Minn. 437; Crowder v. Langdon, 38 N. C. 476; Perkins v. Gay, 3 S. & R. 327; 8 Am. Dec. 653.

¹ Ante, § 3.

² Post, § 344.

¹ Whitney v. Snyder, 2 Lans. 477; Soper v. Peck, 51 Mich. 563. Baldwin v. Bricker, 86 Ind. 221; DeCamp v. Hanna, 29 Ohio St. 467; Corby v. Weddle, 57 Mo. 452; Piffer v. Smith, 57 Ill. 527; Bowers v. Thomas, 63 Wis. 480; Page v. Kreeky, 137 N. Y. 307, 33 N. E. 311.

² Schuykill Co. v. Copley, 67 Pa. St. 386, 5 Am. Rep. 441; Ward v. Colt Co. (Ia.), 109 S. E. 921; Groff v. Longsdon (Mo.), 239 S. W. 1087.

signing as a witness,³ or where he executes a release from "all claims" which he thought was a release of arrears of rent,⁴ or signs a deed which he believed to be a duplicate lease⁵ or signs an agreement when he thought he was writing his name simply as an autograph or to show how it was spelled.⁶ In *Foster v. McKinnon*,⁷ the acceptor of a bill of exchange induced the defendant, a very old man, to indorse it, telling him that it was a guaranty. The plaintiff was a subsequent *bona fide* indorsee of the bill, for value. It was held that he was not bound.

"It is plain on principle and on authority that if a blind man or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then at least if there be no negligence, the signature so obtained is of no force. And it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that *the mind of the signer did not accompany the signature*; in other words that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."

In *Walker v. Ebert*,⁸ defendant who was sued on a promissory note signed by him set up in defense that he was unable to read or write English, that when he signed the note it was represented to him that it was a contract appointing him an agent to sell a certain patent right and believing this he signed it.

³ *Wake v. Harrop*, 3 H. & N. 768.

⁴ *Thoroughgood's Case*, 2 Coke 9.

⁵ *McGinn v. Tobey*, 62 Mich. 252.

⁶ *Alexander v. Brogley*, 63 N. J. L. 307, 43 Atl. 888, 62 N. J. L. 584, 41 Atl. 691.

⁷ L. R. 4 C. P. 711.

⁸ 29 Wis. 194, 9 Am. Rep. 548.

“The party whose signature to such a paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character, and has no intention of signing it, and who is guilty of no negligence in affixing his signature, or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included.”

In *Lewis v. Clay*⁹ the papers were promissory notes for over \$50,000 in all, and the plaintiff was a *bona fide* holder for value. Lord William Neville asked the defendant to sign a roll of papers, covered by blotting paper in which there were four openings. He said that they were private family documents that he could see if he insisted but it was better not. Both of them signed through the openings, the defendant thinking he was simply witnessing the other's signature, whom he had known intimately for years and he had no reason to doubt his honor. Defendant had just come of age. In holding him not liable, Russell C. J. said:

“Did the defendant make the promissory notes in question? If he did not, then the finding of the jury that defendant was not guilty of any want of due care establishes that he is not precluded from saying so. . . . Can it be said that in this case the defendant contracted to pay the plaintiff? His mind never went with such a transaction; for all that appears he had never heard of the plaintiff, and his mind was fraudulently directed into a different channel by the statement that he was merely witnessing a deed or other document. He had no contracting mind, and his signature obtained, by untrue statements fraudulently made, to a document of the existence of which he had no knowledge, cannot bind him. It is as if he had written his name for an autograph collector, or in an album. The case differs in no material respect from one in which a genuine signature is deftly transferred by delicate contrivance from one document to another, and so skillfully as to escape notice under ordinary examination. Or, again, if the body of the promissory notes had been fraudulently written above, and after his signature had been made, it would have been forgery, and in such case it is clear that no recourse could be had upon it.

⁹ 67 L. J. Q. B. 224.

Can it make any difference as to resulting contractual obligation that the body of the note was, without his knowledge, filled up before he was fraudulently induced to put his name in the belief that it was something wholly different? I think not. In plain reason it must be said that the use to which the defendant's signature was applied was in substance and effect, forgery, whether or not it amounted to the criminal offense of forgery."

Late cases seem to favor giving relief to a person who is induced to sign a paper without reading it, through relying on the statement of the other party that it was a document of a different character,¹⁰ as where one signed a contract to purchase goods after the seller had told him that he was to receive them free¹¹ where one was told that the paper was a contract to let him have jewelry on consignment when it was a contract of absolute purchase.¹²

Other examples of misrepresentations as to the character of the instrument are where one believed the paper to be simply a receipt when it was a promissory note¹³ or a release of a claim¹⁴ or a deed¹⁵ or a duplicate of a paper he had already signed when it was a contract of guaranty,¹⁶ or simply a blank on which he signed his name to see if it was correctly spelled; when it was an order for goods.¹⁷

¹⁰ *Weil Co. v. Quidnick Co.*, 33 R. I. 58, 80 Atl. 447; *Freedley v. French*, 154 Mass. 339, 28 N. E. 272; *Western Man Co. v. Cotton*, 126 Ky. 749, 104 S. W. 758; *Prestwood v. Carleton*, 162 Ala. 327, 50 South. 254; *Herreid v. R. Co.*, 159 N. W. 1064. *Page v. Krekey*, 137 N. Y. 307; *Haymaker v. Alford* (Kan.), 201 P. 1112.

¹¹ *Great Northern Co. v. Brown*, 113 Me. 51, 92 Atl. 993.

¹² *Bixler v. Wright*, 100 Atl. 467 (Me.); *St. Louis Jewelry Co. v. Bennett*, 75 Kas. 743, 90 Pac. 246; *Bowman v. Payne* (Cal.), 204 P. 406.

¹³ *Biddeford Nat. Bk. v. Hill*, 102 Me. 346, 66 Atl. 721; *Ribner v. Kleinberg*, 122 N. Y. S. 239.

¹⁴ *Birmingham Co. v. Jordan*, 170 Ala. 536, 54 South. 280.

¹⁵ *Kemery v. Zeigler*, 176 Ind. 660, 96 N. E. 950.

¹⁶ *Carlisle Co. v. Bragg*, 1 K. B. 489 (1911).

¹⁷ *Loveland v. Jenkins Boys Co.*, 49 Wash. 369, 95 Pac. 490; *Alexander v. Brogley*, 63 N. F. (L) 307.

The misreading of a paper, thereby inducing its signing has been held a fraud which may be set up as a defense even though the party might have read the paper himself.¹⁸

In *Foster v. McKinnon*, the absence of negligence was strongly dwelt upon by the court. The distinction is important, for in some instances where a party in full possession of his faculties and able to read, signs a negotiable instrument under the belief that it is an instrument of a different character, and does so without himself reading it but relying on the reading or representation of another, he has been held guilty of such negligence as to estop him from setting up such defense in an action on the note by a *bona fide* holder for value.¹⁹ Even a blind man or one unable to read must use care according to the circumstances of the case.²⁰ This question has frequently arisen in the case of negotiable paper obtained by fraud and in the hands of a third party and the courts have been called on to say which of two innocent parties is to suffer for a mistake occasioned by the fraud of a third.

While a man is not bound, as we shall see, by an agreement which he has been induced to sign by the fraudulent representations of the other party,²¹ such a contract being voidable on that ground, yet as between him and innocent parties who acquire rights in ignorance of the fraud, the equities of the latter are superior to his. But this is restricted to cases where the person defrauded has intended to make the agree-

¹⁸ *Tait v. Locke*, 130 Mo. App. 273, 109 S. W. 105; *West. Man. Co. v. Cotton*, 126 Ky. 749, 104 S. W. 758.

¹⁹ *Chapman v. Rose*, 56 N. Y. 137; *Williams v. Stall*, 79 Ind. 80, 41 Am. Rep. 614.

²⁰ *Taylor v. Atchison*, 54 Ill. 196, 5 Am. Rep. 118; *Griffith v. Keillogg*, 39 Wis. 209, 20 Am. Rep. 48; *Martin v. Smylee*, 55 Mo. 577; *Webb v. Corwin*, 78 Ind. 403; *Citizens' Bank v. Smith*, 29 Minn. 298. See note in L. R. A. 1917 F. 644-646; *Guerin v. Rocco*, 181 Ill. App. 528.

²¹ *Bliss v. R. Co.*, 160 Mass. 447; *Shrimpton v. Netzorg*, 104 Mich. 225, 62 N. W. 343 (Mich.); *Robinson v. Glass*, 94 Ind. 211; *Trambly v. Record*, 130 Mass. 259; post, § 230.

ment, but has been deceived as to its terms or would not have made it if he had known the real facts. Where, however, he never intended to sign the instrument sued, or some trick was used to substitute another for the one he intended to sign, his signature has no legal effect not because the other party was guilty of fraud but because the person who perpetrated the fraud knew that he had no intention of executing that kind of an instrument,²² and third parties whether the instrument be a negotiable one or not can acquire no rights, for the agreement is not voidable but void.²³

The defendant, according to the evidence, if believed, and the finding of the jury, never intended to indorse a bill of exchange at all, but intended to sign a contract of an entirely different nature. It was not his design, and, if he were guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange. It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album, or an order for admission to Temple Church, or on the flyleaf of a book, and there had already been without his knowledge a bill of exchange or a promissory note payable to order inscribed on the other side of the paper. To make the case clearer, suppose the bill or note on the other side of the paper in each of these cases to be written at a time subsequent to the signature, then the fraudulent misapplication of the genuine signature to a different purpose would have been a counterfeit alteration of a writing with intent to defraud, and would therefore have amounted to a forgery. In that case the signer would not have been bound by his signature for two reasons: first, that he never in fact signed the writing declared on, and secondly, that he never intended to sign any contract. In the present case the first reason does not apply, but the second does apply. The defendant never intended to sign that contract, or any such contract. He never intended to put his name to any instrument that then was or thereafter might

²² *Nance v. Lary*, 5 Ala. 370; *Auten v. Gruner*, 90 Ill. 300; *Taylor v. Atchison*, 54 Ill. 196, 5 Am. Rep. 118; *Walker v. Ebert*, 29 Wis. 194; *De Camp v. Hanna*, 29 Ohio St. 467; *Gibbs v. Linabury*, 22 Mich. 479, 7 Am. Rep. 675.

²³ Cases cited in last note.

become negotiable. He was deceived not merely as to the legal effect, but as to the actual contents of the instrument.”²⁴

Negligence, however, on the part of the maker will turn the scale in favor of the innocent third party.²⁵

§ 211. *Concerning Person with Whom Contract Made.*

Where A contracts with B, thinking that he is contracting with C, there can obviously be no valid agreement, for B not being present to A's mind A cannot be a consenting party to an agreement with B. Such a case can of course only arise where A has in contemplation a definite person with whom he desires to contract; it cannot affect general offers which anyone may accept, as, for instance, contracts by advertisement or sales for ready money.

“Does error in regard to the person with whom I contract destroy the consent and annul the agreement? I think that this question ought to be decided by a distinction. Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract. . . . On the contrary, when the consideration of the person with whom I thought I was contracting does not enter at all into the contract, and I should have been equally willing to make the

²⁴ *Foster v. McKinnon*, *supra*.

²⁵ *Chapman v. Rose*, 56 N. Y. 137; *Ross v. Doland*, 29 Ohio St. 473; *Baldwin v. Barrows*, 86 Ind. 351; *Mackey v. Peterson*, 29 Minn. 298, 13 N. W. 132; *Gavagan v. Bryant*, 83 Ill. 376; *Upton v. Tribilcock*, 91 U. S. 50; *Brown v. Reed*, 79 Pa. St. 370, 21 Am. Rep. 75; *Albrecht v. R. Co.*, 87 Wis. 105, 58 N. W. Rep. 72. That the maker of a promissory note is liable to an innocent holder irrespective of negligence is held in *Parkersburg Bank v. Johns*, 22 Va. 520, 46 Am. Rep. 506. This decision is clearly wrong, though in many of the decided cases the defendant is held liable on the doctrine of estoppel on very slight proof of negligence. *Mackey v. Peterson*, *supra*; *Chapman v. Rose*, 56 N. Y. 137; *Baldwin v. Barrows*, 86 Ind. 351; *Ort v. Fowler*, 31 Kan. 478; *Fayette v. Bank*, 54 Ia. 214.

contract with any person whatever as him with whom I thought I was contracting, the contract ought to stand.”¹

In *Cundy v. Lindsay*,² A by imitating the signature of B induced C & Co. to supply him with goods under the belief that they were supplying B. It was held that no contract had ever arisen between C & Co. and A.

“Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never even for an instant of the time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever. As between *him and them there was merely the one side to a contract, where in order to produce a contract, two sides would be required.*”

So where A intends to contract with B, C cannot make himself a party to the contract by substituting himself for B, for no man can be compelled against his will to accept another contracting party in place of the one he intends to deal with, and it makes no difference that the contract with the other would be equally valuable and its results exactly the same.³ Thus where A sends an order for goods to B, or makes any other proposal to B, C cannot make himself a party to the contract, without the knowledge of A, by supplying the goods or otherwise accepting the proposal in the place of B. A may have a set-off against B, and in any case he has a right to the benefit he may contemplate from the character, credit, and substance of B.⁴ And, to take another view of the transaction, C is never present to A's mind in

¹ Fry, J., in *Smith v. Wheatcroft*, 9 Ch. Div. 223 (1878), quoting from Pothier Obligations, § 19.

² 3 App. Cas. 465; *Barcus v. Dorries*, 71 N. Y. (Supp.) 695; *Barber v. Dinsmore*, 72 Pa. St. 427.

³ *Gregory v. Wendell*, 40 Mich. 443; *Holtz v. Schmidt*, 59 N. Y. 253; *Hamet v. Letcher*, 37 Ohio St. 356; *Winchester v. Howard*, 97 Mass. 304, 93 Am. Dec. 93.

⁴ *Boulton v. Jones*, 2 H. & N. 564; *Randolph Iron Co. v. Elliott*, 34 N. J. (L.) 184.

the formation of the contract, and so A is no consenting party to a contract made with C.⁵

In an English case,⁶ one G, the plaintiff, who was a notorious money-lender, had issued an advertisement in the name of "Addison." The defendant borrowed money from him in that name, giving a note for a larger amount than borrowed, but upon discovering the deception repudiated the transaction and offered to repay the amount borrowed. In an action on the note the jury found that plaintiff had intentionally concealed from defendant the fact that he was G in order to induce him to borrow money from him, that defendant was so induced, and that he contracted with "Addison" believing him to be a money-lender of that name. The court held the defendant not bound.

"To enter into a contract for a loan with a creditor such as G., so that, when the day for the payment arrives, the borrower can have no possible chance of a day's or even an hour's grace, but on the contrary has the certainty of being pestered with writs and threats of writs and bailiffs and bankruptcy notices, whereby life is rendered unbearable, and health is often injured, is by no means, in my opinion, the same thing as entering into a contract for a loan with a man who, when the day of payment arrives, does none of these things, but on the contrary deals in a fair and non-oppressive manner."

In *Boston Ice Co. v. Potter*,⁷ P, who had bought ice for his house from the Boston Ice Company, ceased to take it of them on account of some dissatisfaction, and contracted for ice with the Citizens' Ice Company. Subsequently the former bought out the business of the latter company and continued to deliver ice to P without notifying him of the change until after the consumption of the ice so delivered. It was held that

⁵ *Humble v. Hunter*, 12 Q. B. 310, 12 Jur. 121; *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 387; *Fox v. Tabel*, 66 Conn. 397, 34 Atl. Rep. 101.

⁶ *Gordon v. Street* (1899), 2 Q. B. 641, 69 L. J. Q. B. 45.

⁷ 123 Mass. 78.

the Boston Ice Company could not recover from P the price of the ice.

“A party has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture or write a book, or furnish articles of a particular kind or when he relies upon the character or qualities of an individual, or has as in this case, reasons why he does not wish to deal with a particular party. In all these cases as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant before receiving the ice or during its delivery had received notice of the change, and that the Citizens' Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do because the plaintiff failed to inform him of that which he had a right to know. If he had received notice and continued to take the ice as delivered a contract would be implied.”

Where, however, one intends to deal with the person he sees, a mistake as to his character or characteristics will not prevent the contract. Thus if A contracts with B supposing him to be acting for himself when in fact he is acting for an undisclosed principal, the latter may sue on the contract.⁸

“Suppose that one Poor Pape of Dayton, Ohio, goes to a Boston merchant and introduces himself as Rich Pape, who is a rich man and brother of Poor Pape. The merchant believing that he is Rich Pape, agrees to send an assignment of goods addressed to Rich Pape at Dayton, Ohio. Going to another merchant in Boston he introduces himself as Poor Pape but falsely says that he is the agent of his brother, Rich Pape, and the merchant negotiates with him as agent and agrees to send the goods as in the other case. The goods are sent in each instance directed to Rich Pape at Dayton, Ohio. On their arrival Poor Pape in some way obtains possession of them from the transportation company.

⁸ Post, § 196. *Hubbard v. M. Tenbrook*, 124 Pa. St. 291.

In an action of tort by each merchant against the transportation company, the first should fail because there was an actual contract with Poor Pape although there was a mistake as to his identity. The merchant intended to contract with the personality before him. Therefore the defendant delivered the goods to the owner and was justified in so doing. The second has a cause of action because there was clearly no contract and hence the defendant company committed a tort in delivering to Poor Pape who in that case was not the owner. The merchant did not intend to contract with the personality before him. He was not mistaken in regard to the identity and as there was in reality no agency, there could be no contract.”⁹

The reports, says Anson,¹⁰ furnish no cases of genuine mistake of this kind as where A makes an offer to B believing him to be C and B accepts believing the offer to have been made to him.

“If in *Boulton v. Jones* the plaintiff had succeeded a predecessor in business of the same name, he might reasonably have supposed that the order for goods was meant for him. If the order had been given to Boulton A and accepted by Boulton X it is very doubtful whether Jones could have avoided the contract on the ground that though he obtained the goods he wanted from the man to whom his order was addressed, the Boulton whom he had addressed was not the Boulton whom he intended to address.

Circumstances might indicate to the offeree that the offer was intended for a different person. An offer of marriage falling into the hands of a lady for whom it was not intended, where two ladies chanced to have the same name and address, might or might not be turned into a promise by acceptance according as the terms of acquaintance or age of the parties might justify the recipient in supposing that the offer was meant for her. An offer for the purchase of goods might not call for the same nicety of consideration on the part of the offeree.”

⁹ Ashley Contr., § 46; *Edmunds v. Despatch Trans. Co.*, 135 Mass. 459.

¹⁰ Contr., § 185.

§ 212. *Concerning Subject-Matter of Contract.*

Mistake as to the subject-matter of the contract may relate (a) to its existence or (b) to its identity.

(a) If persons make an agreement in regard to something which, unknown to both of them, is non-existent at the time, the mistake goes to the root of the matter and avoids the contract, for there can be no contract where there is no subject-matter.¹ Thus, where A agrees to sell to B a certain horse which, unknown to the parties, is dead, or a certain building which is burned down, at the time of their making the agreement, there is no binding contract.² So, where one purchased an annuity which at the time of purchase had already failed owing to the death of the annuitant,³ where an assignment of life insurance policy on the life of another was made, both parties believing that he was living, but it turned out that he had died,⁴ where a sale was made of a cargo of corn which was supposed by the parties to be at the time on its voyage from a foreign port to England, but which had in fact prior to that time become so heated that it had to be unloaded and sold,⁵ where one sold to another the right to collect a certain judgment which they both thought was in existence, but there was no such judgment,⁶ where a person agreed with

¹ Griffith v. Sebastian County, 49 Ark. 24, 3 S. W. 886; Fleetwood v. Brown, 109 Ind. 567, 9 N. E. 352, 11 N. E. Rep. 779; Greib v. Reynolds, 35 Minn. 331, 28 N. W. 923; Woodworth v. McLean, 97 Mo. 325, 11 S. W. Rep. 43; Gebel v. Weiss, 42 N. J. Eq. 521, 8 Atl. 889; Bedell v. Wilder, 65 Vt. 406, 26 Atl. 589; U. S. v. Charles, 74 Fed. 142; Fink v. Smith, 170 Pa. St. 124, 32 Atl. 566; Brick Co. v. Pond, 38 Ohio St. 65; King v. Doolittle, 38 Tenn. 77; Silvernail v. Cole, 12 Barb. 685. This does not of course apply to sales of goods to be acquired or manufactured. Calkins v. Lockwood, 16 Conn. 276, 41 Am. Dec. 143.

² Bradford v. Chicago, 25 Ill. 423; Allen v. Hammond, 11 Pet. 71; Thompson v. Gould, 20 Pick. 139; Anderson v. Armstead, 69 Ill. 452; Dale v. Roosevelt, 5 Johns. Ch. 174, 2 Cow. 129.

³ Strickland v. Turner, 7 Ex. 217; Riegel v. Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 153 Pa. St., 134, 25 Atl. 1070.

⁴ Scott v. Coulson, 2 Ch. 249 (1903).

⁵ Couturier v. Hastie, 5 H. L. Cas. 673.

⁶ Gibson v. Pelkie, 37 Mich. 380.

another to lease or buy an estate from him which both believed to belong to him, but which was found to belong to the other party,⁷ where there was a covenant in a lease by which a person undertook to dig from the premises not less than a certain unnumber of tons of potter's clay annually, paying a certain royalty per ton, and unknown to the parties there had never been so much clay under the land.

“Here both parties might well have supposed that there was clay under the land. They agree on the assumption that it is there; and the covenant is applicable only if there be clay.”⁸

But where there is an absolute unconditional contract not showing any intention that the existence of the thing was material, but rather that each party intended to run the risk, here the promisor will be bound⁹ though the thing does not exist. Where one agreed to sell and deliver certain goods on the arrival of a certain ship and on its arrival the goods were not on board as was expected, it was held that he was nevertheless responsible for the non-delivery.¹⁰ In *Hills v. Sughrue*,¹¹ the defendant agreed with the plaintiff by charter-party to take his (the defendant's) ship to the island of Ichaboe and there load a complete cargo of guano and return with it to England, being paid a high rate of freight. There was so little guano at Ichaboe that the performance of the defendant's promise to load a complete

⁷ *Bingham v. Bingham*, 1 Ves. 126.

⁸ *Clifford v. Watts*, L. R. 56 P. 577; *Fritzler v. Robinson*, 70 Ia. 500, 31 N. W. 61; *Gribben v. Atkins*, 64 Mich. 651, 31 N. W. 570; *Muhlenberg v. Henning*, 116 Pa. St. 138, 9 Atl. 144; *Bluestone Coal Co. v. Bell*, 38 W. Va. 297, 18 S. E. 493.

⁹ *Jervis v. Tomkinson*, 1 H. & N. 195; *Barr v. Gibson*, 3 M. & W. 390; *Bute v. Thompson*, 13 M. & W. 487; *Perkins v. Gay*, 3 Serg. & R. 237, 7 Am. Dec. 653; *Valley City Milling Co. v. Prange*, 123 Mich. 211, 81 N. W. 1074. See *Kowalke v. R. Co.*, 103 Wis. 472, where the mistake was the fact of pregnancy at the time of the release by a woman of her claim for damages.

¹⁰ *Hale v. Rawson*, 4 C. B. (N. S.) 85.

¹¹ 15 M. & W. 253.

cargo was impossible. The plaintiff sued him for damages for failure to bring home a cargo, and was held to be entitled to recover. What amount of guano was on the island was clearly doubtful and the defendant took the risk of it.

(b) Where A agrees with B concerning one thing, thinking that B is referring to that, while B agrees with A concerning another thing and thinks that A refers to that other thing, there is no real agreement, there is a mistake in the identity of the thing contracted for—the minds of the parties never really meet.¹² Thus, where A agreed to purchase from B a lot on Prospect street and there were two streets of that name in the town, and A meant a lot on one of these streets and B a lot on the other, it was held that there was no agreement.¹³ In another case A agreed to buy of B a cargo of cotton “to arrive ex Peerless from Bombay,” and there were two ships of that name, and the buyer meant one and the seller the other, it was held that there was no contract, and that the buyer was not bound to accept a cargo which, though it came “ex Peerless from Bombay,” did not come in the vessel of that name which was present to his mind when he made the agreement.¹⁴ For the same reasons it was decided that there was no binding agreement where B offered to work for \$3.00 per day and A understood him to say \$1.50 per day,¹⁵ where B asked \$165 for certain goods and A accepted thinking he asked \$65 for them,¹⁶ and where A intended to buy five

¹² *Strong v. Lane*, 66 Minn. 94, 68 N. W. 765; *Harvey v. Harris*, 112 Mass. 32; *Rupley v. Daggett*, 74 Ill. 351; *Cutts v. Guild*, 57 N. Y. 229; *Gardner v. Lane*, 6 Allen 492; *Hartford, etc., R. Co. v. Jackson*, 24 Conn. 574, 63 Am. Dec. 177; *Hoague v. Mackay*, 44 Kan. 277, 24 Pac. 477; *Pitts, etc., Coal Co. v. Slack*, 42 La. Ann. 107, 7 South. 230; *Robinson v. Estes*, 53 Mo. (App.) 582; *Rowland v. R. Co.*, 61 Conn. 103, 23 Atl. 755.

¹³ *Kyle v. Kavanaugh*, 103 Mass. 356; *Strong v. Lane*, 66 Minn. 94, 68 N. W. 765.

¹⁴ *Raffles v. Wichelhaus*, 2 H. & C. 906.

¹⁵ *Turner v. Webster*, 24 Kan. 335.

¹⁶ *Ruply v. Daggett*, 74 Ill. 351.

carloads and B intended to sell only one carload.¹⁷ These are all illustrations of the principle that the minds of the parties must meet or there is no agreement.¹⁸

If there is no ambiguity in the language or words used, the fact that one of the parties mistakes its meaning is not material—for as we have seen the law does not act on what a person thinks but on what he says.¹⁹ Thus while it was held that if a person agrees to sell and another to buy cotton to arrive “ex Peerless from Bombay,” and there are two ships of that name and the buyer means one and the seller another, there is no agreement, yet if there is only one ship of that name, but one of the parties is thinking of a ship of a different name, the agreement is valid.²⁰

§ 213. *Mistake of Expression.*

A mistake of expression is said to arise where the parties have agreed upon the terms of the contract but in reducing these terms to writing they are expressed differently from the real intention of both. A for example applies to an insurance company for a policy on his house No. 59 Milwaukee Ave., and the agent examines the premises and an oral contract to insure the house is entered into, and the written policy subsequently delivered. The house being afterwards destroyed by fire it is discovered that the policy as issued describes it as No. 57 Milwaukee Ave.¹ In a suit at law on

¹⁷ *Singer v. Grand Rapids Co.*, 43 S. E. 755 (Ga.).

¹⁸ *Ante*, § 3.

¹⁹ See *ante*, § 4.

²⁰ *Holmes Com. Law*, 309; *Anson Contr.*, 130, explaining *Raffles v. Wichelhaus*, 2 H. & C. 906. In a Missouri case a person made an offer to another for car No. 5029 loaded with hay. The offeree accepted and it afterwards occurred to the offeree that he had made a mistake, and in looking up his books he discovered that he was thinking of car No. 5009 and intended to sell that. The agreement was held binding.

¹ *Home Ins. Co. v. Myer*, 93 Ill. 272. *Sudduth v. Coal Co.* (U. S.), 268 Fed. 433.

the policy A could not recover for he could not prove that 57 Milwaukee Ave., had been destroyed nor could he prove by oral evidence that the parties intended to insure No. 59 and not No. 57—because this would be contrary to a cardinal rule of evidence by which a written agreement cannot be varied or contradicted by parol.² A court of equity however will correct or reform the policy so as to express the real intention.³

But where the mistake is so obvious on the face of the writing as to leave no doubt of the intention of the parties; and external evidence is unnecessary, here even a court of law will construe it according to the obvious intention, as for example where it is clear that one word has been written for another the court will read the instrument with the mistake corrected. Thus in an English case the House of Lords decided that when a deed covenanted that “Mary” should do certain things and “John” others and it was plain that the names had been transposed by mistake, the court would read the deed as though the change had been made saying:

“It is a great mistake if it is supposed that even a Court of Law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a Court of Law, as well as a Court of Equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes—without, I say, going into those cases at all, both Courts of Law and of Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty. I will give your Lordships an instance from a case in Douglas (p. 384). A bond was executed with a condition that the bond was to be void if a party did not pay a sum of money at a given day. The man who had given the bond insisted on a literal performance, just as the appellant does here, who says it is ‘John’ and not ‘Mary,’ and I will have my bond, and noth-

² See Post, § 379.

³ 9 Cyc. 392, 13 C. J. 373; *De Jarnett v. Cooper*, 59 Cal. 703.

ing but my bond. So this man said, The condition is if I do not pay, and I have not paid, and therefore the bond is void. But what did the court of law say? That it was an obvious error, and therefore that the 'not' was to be rejected, and that the bond was to be void if the man did pay."⁴

§ 214. *Mistake of One Caused by Other.*

If the other party has caused the mistake by misrepresentation, designedly and for the purpose of inducing the contract, the contract is voidable both at law and in equity.¹ But this is on the ground of fraud, a subject which is considered in another place.²

§ 215. *Mistake of One Known to Other.*

Mistake by one party as to the nature of the promise will, if known to the other party before the agreement is concluded, render the contract voidable¹—as for example where A leased land to B and by mistake fixed the rent at \$130 instead of \$230 and B knew of the mistake,² where a rate sheet of a railroad gave the rate for tickets from Atlanta, Ga., to Rogers, Ark., at \$21.75, when it should have been \$36.70 and the defendant knowing the mistake but the ticket agent being ignorant of it, bought a large number at the lower rate,³ where B having refused an offer from A of

¹ Wilson v. Wilson, 5 H. L. Cas. 39; Boas v. Zinke (Mich.), 188 N. W. 512.

² Lawson Rights, Rem. & Pr., § 2340; Phillips v. Hollister, 2 Cold. 267, Beebe v. Young, 14 Mich. 136.

³ See post, § 228.

⁴ Harren v. Foley, 62 Wis. 584, 22 N. W. 831; Rider v. Powell, 78 N. Y. 310; Griffin v. O'Neill, 48 Kan. 117, 29 Pac. 143; Dorsey Printing Co. v. Gainesville Cotton Seed Oil Mill, etc., Co., 61 S. W. 556; Everson v. International Granite Co., 65 Vt. 658, 27 Atl. 320; Moffatt Co. v. Rochester, 178 U. S. 373; Griswold v. Hazard, 141 U. S. 260; Harris v. Pepperhill, L. R. 5 Eq. 1; Paget v. Marshall, 28 Chi. Div. 255.

² Garrard v. Frankel, 30 Beav. 445.

³ Shelton v. Ellis, 70 Ga., 297.

£2,000, wrote him a letter containing an offer to sell for £1,200, whereas he intended to write £2,100, which A must have known.⁴

A mistake of a contractor in his computation in making a bid will not bind him where the other party knows of it when he accepts the bid.⁵

In *Hume v. United States*,⁶ the plaintiff sued the government for the price of shucks furnished it. The plaintiff had submitted bids for furnishing various articles on blank schedules provided by the government. It was customary to buy shucks by the hundred-weight, but in the schedule the printed word "pounds" had not been changed, so that the plaintiff submitted a bid for furnishing shucks at sixty cents a pound, which was accepted. The shucks were worth less than two cents cents a pound. The court held that the plaintiff knew or ought to have known that there was a clerical error in the contract, and that the government agents could not have intended to accept a bid for shucks at thirty times their real value.

But the fact that one of the parties knows that the other is mistaken as to the value or quality of the subject-matter or as to his expectations or motives⁷ does not affect the agreement, for a seller of property is not obliged to disclose matters not known to the buyer lessening its apparent value nor is the buyer obliged to disclose matters enhancing its value about which he alone has knowledge.⁸ The English case of *Smith v. Hughes*⁹ illustrates the distinc-

⁴ *Webster v. Cecil*, 30 Beav. 62. This was described in a later case as snapping at an offer which the party must have perfectly well known to be made by mistake. *Tamplin v. James*, 15 Ch. Div. 215; *Singer v. Grand Rapids Co.*, 43 S. E. 757 (Ga.).

⁵ *Bromigin v. Bloomington*, 234 Ill. 114, 84 N. E. 700; *Young Co. v. Springer*, 113 Minn. 382, 129 N. W. 773.

⁶ 132 U. S. 406.

⁷ See ante, § 207.

⁸ See post, § 231.

⁹ L. R. 6 Q. B. 597.

tion. Here plaintiff sold defendant a quantity of oats, defendant thinking that they were old oats, and plaintiff knowing that he thought so and knowing that they were not, but saying nothing about their quality. It was held that the sale was binding. The court said that if defendant had thought they were old oats and that plaintiff was selling them as old oats, and plaintiff had known that defendant in making his offer thought he was being promised old oats, the sale would have been voidable. It was not knowledge of the mistake as to the quality of the oats, but knowledge of the mistake as to the quality promised, which would affect the agreement. The opinions of the judges are very instructive. Cockburn, C. J., said:

“We must assume that nothing was said on the subject of the defendant’s manager desiring to buy *old* oats, nor of the oats having been said to be old; while, on the other hand, we must assume that the defendant’s manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of the opinion that it will not. . . . I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will imply a warranty—as where, for instance, an article is ordered for a specific purpose—and the buyer has full opportunity of inspecting and forming his own judgment, if he chooses to act on his own judgment, the rule *caveat emptor* applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely, good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so; but the seller neither said nor did anything to contribute to his deception.

He has himself to blame. The question is not what a man of scrupulous morality or nice honor would do under such circumstances. The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honor would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding. . . . It only remains to deal with an argument which was pressed upon us, that the defendant in the present case intended to buy old oats, and the plaintiff to sell new, so the two minds were not *ad idem*; and that consequently there was no contract. This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. The defendant believed the oats to be old, and was induced to agree to buy them, but he omitted to make their age a condition of the contract. All that can be said is, that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them. Suppose a person to buy a horse without a warranty, believing him to be sound, and the horse turns out unsound, could it be contended that it would be open to him to say that, as he had intended to buy a sound horse, and the seller to sell an unsound horse, the contract was void, because the seller must have known from the price the buyer was willing to give, or from his general habits as a buyer of horses, that he thought the horse was sound? The cases are exactly parallel."

Blackburn, J., said:

"In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the pur-

chaser of that impression is not fraud or deceit; for whatever may be the case in a court of morals, *there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.*”

And Hannen, J., said:

“It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. . . . But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in a case of sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not avoided by this error of the vendor.¹⁰ . . . But if in the last-mentioned case the purchaser, in the course of the negotiations preliminary to the contract, had discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock cited from Paley, that a promise is to be performed ‘in that sense in which the promiser apprehended at the time the promisee received it’ and may be thus expressed: ‘The promiser is not bound to fulfill a promise in a sense in which the promisee knew at the time the promiser did not intend it.’ And in considering the question, in what sense a promisee is entitled to enforce a promise, it matters not in what way the knowledge of the meaning in which the promiser made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promiser, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promiser did not assent . . . If, in the present case, the plaintiff knew that the defendant in dealing with him for oats, did so on the assumption that the plaintiff was contracting to sell him old oats, he was aware that the defendant apprehended the contract in a different sense to that in which he meant it, and he is thereby deprived of the right to insist that the

¹⁰ Citing *Scott v. Littledale*, 8 E. & B. 815.

defendant shall be bound by that which was the apparent, and not the real bargain."

§ 216. *Mistakes of Law.*

Mistake, to be a ground of avoiding an agreement, must be a mistake of fact and not of law.¹ A mistake of law is where a person knows the facts of the case, but is ignorant of the legal consequences.² Mistake as to particular private rights is a mixed mistake of law and fact, for private rights of property, although they are the result of rules of law, or depend upon rules of law applied to the construction of legal instruments, are considered matters of fact. Hence an agreement by A to buy an estate from B, which both A and B believe to belong to B, but which does not, is a mistake of fact.³

"In the maxim (ignorance of the law excuses no one) the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake, and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."⁴

And mistake as to a foreign law or the law of a sister State is a mistake of fact and not of law.⁵ Where two parties enter into a contract under a mutual mistake of law, equity will relieve if it can be done without injustice to the other, especially if the party to be benefited by the mistake invokes

¹ 9 Cyc. 403; 13 C. J. 267.

² *Mowatt v. Wright*, 1 Wend. 355, 19 Am. Dec. 508; *Lamson v. Hobel Co. (Iowa)*, 185 N. W. 472.

³ *Bingham v. Bingham*, 1 Ves. Sr. 126.

⁴ *Halsbury, Ch.*, in *Cooper v. Phibbs*, L. R. 2 H. L. 149.

⁵ *Norton v. Marden*, 15 Me. 45, 32 Am. Dec. 132; *Haven v. Foster*, Pick. 112, 19 Am. Dec. 353; *King v. Doolittle*, 1 Head 77.

the aid of equity to put him in a position where he may profit by the mistake.⁶ If one of the parties is mistaken as to the law, and the other knowing this contracts with him, equity will relieve upon the ground of fraud.⁷

§ 217. *Remedy of Party at Law and in Equity.*

The law offers two remedies to a person who has entered into an agreement void on the ground of mistake. If it be still executory he may repudiate it and successfully defend an action brought upon it; or if he has paid money under the contract, he may recover it back upon the general principle that "where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, an action will lie to recover it back."¹ In equity he may ask to have the agreement set aside or canceled or reformed.²

B. .

MISREPRESENTATION.

§ 218. *Introductory.*

Misrepresentation in order to affect a contract, must be made either (a) with a *fraudulent motive*, or (b) must occur in the case of *certain special contracts*, or must be (c) *a term or integral part of the contract*.

⁶ Friebebnicht v. Meyer, 39 N. J. (L.) 167; State v. Paup, 13 Ark. 129, 56 Am. Dec. 303.

⁷ Eldridge v. Dexter, 88 Me. 191, 33 Atl. Rep. 974; Hickam v. Hickam, 46 Mo. (App.) 406; Haviland v. Willetts, 141 N. Y. 35, 35 N. E. Rep. 958; see post, § 239.

¹ See ante, § 54. As to recovery of property see Rodliff v. Dallinger, 141 Mass. 1.

² See ante, § 213; Hamilton v. McAlister, 27 S. E. Rep. 63 (S. C.); Hudson v. Waugh, 25 S. E. Rep. 530 (Va.); Fullerton v. U. S. Casualty Co., 167 N. W. 702 (Ia.).

§ 219. *Fraudulent Misrepresentation.*

Misrepresentation made with a fraudulent motive is fraud and will be treated further on. The distinction between misrepresentation and fraud is that the former is an *innocent misstatement or non-disclosure of fact*, while the latter consists in *representations known to be false, or made in reckless ignorance of their truth or falsehood.*

§ 220. *Special Contracts Affected by Misrepresentation.*

The special contracts which are affected in their formation by misrepresentation or non-disclosure, are contracts *uberrimae fidei*, i. e., those in which one of the parties must, from the nature of the contract, *rely upon statements* made by the other, and is placed at a disadvantage as regards his means of acquiring knowledge upon the subject. Four classes of cases fall under this head, viz.: (1) contracts of insurance; (2) contracts for the purchase of shares in corporations; (3) contracts for the sale of land; (4) where the parties stand towards one another in certain fiduciary relations.

§ 221. *Contracts of Insurance.*

(1) In the contract of marine insurance, the insured is bound to give to the underwriter all such information as would be likely to determine his judgment in accepting the risk; and misrepresentation or concealment of any such matter, though unaccompanied by fraudulent intention, avoids the policy.¹ Every fact is material which, if communicated to the underwriter, would have influenced his action in declining or accepting the risk; and concealment, though the effect of accident, negligence, inadvertence or mistake, will, if

¹ *Ionides v. Pender*, L. R. 9 Q. B. 537; *Blackburn v. Vigors*, 17 Q. B. Div. 578.

material, avoid the policy.² In the contract of fire insurance the same rule exists and a false representation of a material fact, however innocently made, avoids the policy. But as the universal practice now is to make applications for insurance by way of answers to specific written inquiries, it is held, under such an application, that innocent failure to communicate, or innocent non-disclosure of facts about which the plaintiff was not asked, will not avoid the policy.³ In life insurance an untrue allegation or concealment of a material fact "will avoid the policy, though such allegation or concealment be the result of accident, negligence or design."⁴

§ 222. *Contracts for Purchase of Stock in Corporations.*

(2) The English courts require that persons issuing a prospectus of a corporation inviting others to take shares in it on the faith of the representations therein contained, shall state everything with strict and scrupulous accuracy, and not only abstain from stating as a fact that which is not so, but omit no one fact within their knowledge the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares,¹ the Lord Chancellor in one case saying that mere non-disclosure can never amount to fraud unless accompanied with such substantial repre-

² *McLanahan v. Ins. Co.*, 1 Pet. 170; *Oliver v. Greene*, 3 Mass. 133. 3 Am. Dec. 96; *Burritt v. Ins. Co.*, 5 Hill, 189, 40 Am. Dec. 345; *Ins. Co. v. Lyman*, 15 Wall. 664; *Daniels v. Ins. Co.*, 12 Cush. 416, 59 Am. Dec. 192; *Bobbitt v. Ins. Co.*, 66 N. C. 70, 9 Am. Rep. 494; *North Am. Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638; *Armour v. Trans-Atlantic Ins. Co.*, 90 N. Y. 450.

³ *Burritt v. Ins. Co.*, 5 Hill, 188, 40 Am. Dec. 345; *Green v. Ins. Co.*, 10 Pick. 402; *Browning v. Ins. Co.*, 71 N. Y. 548; *Dennison v. Ins. Co.*, 20 Me. 125, 37 Am. Dec. 42; *Short v. Ins. Co.*, 90 N. Y. 16.

⁴ *London Ass. Co. v. Mensel*, 11 Ch. Div. 363; *Vogle v. Eagle Ins. Co.*, 6 Cush. 42; *Clemans v. Supreme Assembly*, 131 N. Y. 485; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519.

¹ *New Brunswick, etc., R. Co. v. Muggeridge*, 1 Dr. & Sm. 381. *Venezuela R. Co. v. Kisch*, L. R. 2 H. L. 113.

sentations as give a false air to facts, but that "it might be ground in a proper proceeding and at a proper time for *setting aside an allotment or purchase of shares.*"² Following this, Mr. Anson³ includes contracts for the purchase of shares in companies as one of the special contracts which misrepresentation will avoid. But it is not believed that the American adjudications require in such contracts any greater degree of good faith than is exacted of parties in regard to other contracts; nor would such contracts be avoided unless the representations were made with the fraudulent intention of inducing other persons relying on them to act.⁴

§ 223. *Contracts for Sale of Land.*

(3) In England it is held that a misdescription of the premises sold or of the terms to which they are subject, though made without any fraudulent intention, will vitiate the contract.¹ But in the United States the subject-matter of the contract for the sale of land does not require any greater degree of good faith on the part of the vendor than is required on the sale of any other class of property. "The rule excusing parties from making disclosures in sales of personalty applies equally in sales of real estate."²

§ 224. *Contracts Between Parties in Certain Fiduciary Relations.*

(4) The utmost good faith is required where the contracting parties sustain confidential relations to each other. Full disclosure of material facts is required in contracts between

² Peek v. Gurney, L. R. 6 H. L. 403.

³ Contr. 151.

⁴ Pom. Eq. Jur., § 881. See Brewster v. Hatch, 122 N. Y. 340.

¹ Anson Contr., 150; Flight v. Booth, 1 Bing. N. C. 370; Jones v. Edney, 3 Camp. 285.

² Bigelow on Fraud, 33; Williams v. Spur, 24 Mich. 335; Wilcox v. Iowa Univ., 32 Ia. 367; Livingston v. Peru Iron Co., 2 Paige 372.

agent and principal, attorney and client, trustee and beneficiary, and the like, where special confidence is reposed.¹

§ 225. *Term in Contract.*

If a representation is a term, *i. e.*, an integral part of a contract, it becomes a promise. If it is false, its untruth does not affect the formation of the contract, but operates to give a discharge, or a right of action, or both, to the party injured by the falsehood, such falsehood being in truth the breach of a promise. In the leading case of *Behn v. Burness*¹ it is said:

“Properly speaking, a representation is a statement or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract; and, consequently, the contract is not broken though the representation proves to be untrue; *nor* (with the exception of the case of policies of insurance, at all events marine policies, which stand on a peculiar anomalous footing) *is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue.* . . . Though representations are not usually contained in the written instrument of contract, yet they sometimes are. But it is plain that their insertion therein can not alter their nature. A question, however, may arise whether a descriptive statement in the written instrument is a mere representation, or whether it is a substantive part of the contract. This is a question of construc-

¹ Brooks v. Martin, 2 Wall. 84; Baker v. Humphrey, 101 U. S. 502; Reed v. Peterson, 91 Ill. 288. Brewster v. Hatch, 122 N. Y. 342. So as between director and stockholder in corporations. Oliver v. Oliver, 45 S. E. Rep. 233 (Ga.). Fraud by the obligee which will avoid a contract of suretyship is not confined to untrue statements, but may consist in the concealment or withholding by him from the surety of material facts affecting the risk which it is his duty to disclose. Copper Process Co. v. Chicago Bonding Co., 262 Fed. 66.

¹ 1 B. & S. 877, 3 Id. 751.

sion which the court and not the jury must determine. If the court should come to the conclusion that such a statement by one party was intended to be a substantive part of his contract, and not a mere representation, the often discussed question may, of course, be raised, whether this part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract but will only be a cause of action for a compensation in damages.”²

In the above case the plaintiff had made an agreement in writing that his ship *then in the port* of Amsterdam should proceed to a certain place and there load a cargo to carry to another place. At that date the ship unknown to the plaintiff was not in the port of Amsterdam, and did not arrive there until later. It was held that the words amounted to a condition or promise giving the defendant a right to repudiate the contract.

In *Bannerman v. White*,³ B offered hops for sale to W, and W inquired if any sulphur had been used on them, and B said no, but was mistaken. W then purchased the hops and afterwards repudiated the contract on the ground that sulphur had been used in their treatment. The jury found that the statement that the sulphur had not been used was not wilfully false, and that the affirmation that no sulphur had been used was intended by the parties to be part of the contract of sale and a warranty by the plaintiff. The court ruled that the statement being a promise its breach discharged the defendant from liability to take the hops. It will be observed of this case that the representation was made before the agreement was entered into, while in *Behn v. Burness* the representation was contained in the written agreement.⁴

² As to which see post, Chap. XVI; *Wolcott v. Mount*, 38 N. J. (L.) 16, 20 Atl. Rep. 425.

³ 10 C. B. N. S. 860.

⁴ “What really happened was that Bannerman made a statement to White, and then the two made a contract which did not include his statement, though but for the statement the parties would never have entered on a discussion of terms. The consent of the buyer

§ 226. *Remedies at Law.*

An innocent misrepresentation we have seen does not unless in the cases excepted (§ 218) give a person the right to refuse to be bound by the agreement nor does it give a right of action for damages caused to the plaintiff by the untruth— for a test of fraud as opposed to misrepresentation is that the former does and the latter does not give rise to an action *ex delicto*.¹

§ 227. *Remedies in Equity.*

In equity, however, innocent misrepresentation is a good ground for resisting specific performance. In *Lamare v. Dixon*,¹ L a wine merchant wanting to lease cellars for his goods stated to D that he must have dry cellars and D assuring him that his were dry, L signed an agreement for a lease of them, but nothing was said in the lease as to their condition. They were found to be damp and in a suit for specific performance of the lease brought by D against L, the House of Lords refused to enforce it, saying:

“I quite agree that this representation was not a guarantee. It was not introduced into the agreement on the face of it, and the result of that is that in all probability Lamar could not sue in a court of law for a breach of any such

was, in fact, obtained by a misrepresentation of a material fact, and was therefore unreal, but the common law courts had precluded themselves from giving any effect to a representation unless it was a term in the contract, and so in order to do justice they were compelled to drag into the contract terms which it was never meant to contain. Anson Contr. (8th Ed.) 152.

¹ Arkwright v. Newbold, 17 Ch. Div. 320; Cowley v. Smyth, 46 N. J. L. 380; Wakeman v. Dalley, 51 N. Y. 27; Tucker v. White, 125 Mass. 334. In a few states, however, an action will lie for damages caused by innocent misrepresentation. Holcomb v. Noble, 69 Mich. 396; Davis v. Nuzum, 72 Wis. 439. See Florida v. Morrison, 44 Mo. (App.) 529. And in one or two damages may be set off in an action for the price. Mulvey v. King, 39 Ohio St. 491; Loper v. Robinson, 54 Tex. 510. See Hitchcock v. Baughan, 44 Mo. (App.) 42.

¹ L. R. 6 H. L. 414.

guarantee or undertaking; and very probably he could not maintain a suit in a court of equity to cancel the agreement on the ground of misrepresentation. At the same time if the representation was made and if that representation has not been and cannot be fulfilled, it appears to me upon all the authorities that that is a perfectly good defense in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled."

And an innocent representation of a material fact is a ground in equity for rescinding or canceling the contract.² In *Redgrave v. Hurd*,³ R had induced H to agree to buy his house by misstating the amount of the business he did in it. H asked to have the contract set aside and damages given him for the deceit. The Court of Appeal held that there was no such deceit, or statement false to R's knowledge, as would entitle H to damages; yet *the contract would be rescinded* because H had been induced to enter into it by the misrepresentation of R, JESSEL, M. R., saying:

"As regards the rescission of a contract there was no doubt a difference between the rules of courts of equity and the rules of courts of common law. . . . According to the decisions of courts of equity it was not necessary in order to set aside a contract obtained by material false representation to prove that the party who obtained it, knew at the time that the representation was made, that it was false."

² *Thompson v. Lee*, 31 Ala. 292. *Allen v. Hart*, 72 Ill. 104; *Trenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Converse v. Blumrick*, 14 Mich. 409, 90 Am. Dec. 230; *Florida v. Morrison*, 44 Mo. App. 529; *Cowley v. Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432; *Bower v. Fenn*, 90 Pa. St. 559, 35 Am. Rep. 662; *Smith v. Richards*, 13 Pet. 26. But see *Southern Development Co. v. Silva*, 125 U. S. 247.

³ 20 Ch. Div. 12; *Newbigging v. Adam*, 34 Ch. Div. 582.

C.

FRAUD.

§ 228. *Fraud Defined.*

Fraud is a false representation of fact, made by the party who is charged with it, with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it shall be acted upon by the complaining party, and actually inducing him to act upon it, to his damage. From this definition, it is necessary in order to constitute fraud that the following constituent elements shall be present, viz.: (a) A false *representation*. (b) A representation of *fact*. (c) A representation made by the *party charged*. (d) *Knowledge* of its falsehood or a reckless indifference in the matter. (e) An intention that it *shall be acted upon* by the other party. (f) A *reliance* upon it by the other party. (g) *Damage* to the party deceived.

(a) False Representation.

§ 229. *By Act or By Omission.*

A false representation may be either in making a statement or in concealing a fact—for the failure to communicate facts which one person is bound to communicate to another is a representation that those facts do not exist.¹ The question then arises when does this duty to communicate arise and when is concealment as much of a representation as a positive statement.

¹ Stewart v. Wyoming Ranch Co., 128 U. S. 383; Wood v. Jones (Ark.), 237 S. W. 99.

§ 230. *Making False Statements.*

A false statement made by one party to an agreement by reason of which the other is induced to enter into it is a fraud entitling him to avoid the contract.¹

The following are examples of representations which have been held to establish fraud on the part of the vendor in a contract of sale—where he overstates the amount of the previous sales of a patented article which he is offering to sell;² where he overstates the profits of the business;³ where he states that the property he is selling is free from incumbrances;⁴ where he states that the makers of a note are “wealthy and responsible men;”⁵ where he states that a farm yielded a certain quantity of hay;⁶ where he sells property when it does not really exist;⁷ where he states that railroad bonds are secured by first mortgage.⁸ Examples of false statements by the buyer of property are found in statements of his credit and financial standing,⁹ of his identity and business connections,¹⁰ or his presentation of forged rec-

¹ Walker v. Dunlop, 5 Hayw. (Tenn.) 271, 9 Am. Dec. 787; Bean v. Herrick, 12 Me. 262, 28 Am. Dec. 176. Campbell v. Hillman, 15 B. Mon. 508, 61 Am. Dec. 195; Pryor v. Foster, 130 N. Y. 171, 29 N. E. 125; Fox v. Tarbel, 66 Conn. 397, 34 Atl. 101; Scott v. Land Co. (Cal.), 207 P. 389.

² Crossland v. Hail, 33 N. J. (Eq.) 111; Miller v. Barber, 66 N. Y. 558; Somers v. Richards, 46 Vt. 170.

³ Taylor v. Saurman, 110 Pa. St. 3.

⁴ Ward v. Weman, 17 Wend. 193; Haight v. Hoyt, 19 N. Y. 464; Mason v. Bovet, 1 Denio, 69.

⁵ Alexander v. Dennis, 9 Port. 174.

⁶ Coon v. Atwell, 46 N. H. 510; Martin v. Jordan, 60 Me. 531.

⁷ Wordell v. Fosdick, 13 Johns. 325.

⁸ Clark v. Edgar, 84 Mo. 106.

⁹ Lucky v. Roberts, 25 Conn. 486. Cary v. Hotailing, 1 Hill, 311; Eaton v. Avery, 83 N. Y. 31; Bugg v. Shoe Co., 64 Ark. 12, 40 S. W. 34; Bell v. Hauffman, 9 Colo. App. 259, 47 Pac. 1036.

¹⁰ Barker v. Dinsmore, 72 Pa. St. 427; McCrillis v. Allen, 57 Vt. 505; Aborn v. Merchants' Despatch Co., 135 Mass. 283; Radcliffe v. Dalingier, 141 Mass. 1.

ommendations to others,¹¹ and the transfer in payment of the price of worthless securities,¹² counterfeit money,¹³ stolen goods,¹⁴ or of checks which will not be honored on account of want of funds.¹⁵

§ 231. *No General Duty to Disclose Facts.*

There is ordinarily no general duty on one to disclose to another facts with reference to the agreement they are entering into.¹ Buyer and seller for example are not bound to tell each other all they know of the thing which is being sold² even though one knows that if the other knew what he knew he would not enter into the bargain. The silence of a seller when the buyer is exaggerating the value or quality of the goods is not a misrepresentation nor is the seller obliged to point out defects in them, or tell him that they are of a poorer quality than he thinks they are. The maxim of the law is *caveat emptor*.³

“The seller may know of defects in his goods; and yet if he makes no false representations, employs no artifice to conceal them, is guilty of no positive deceit, and leaves the buyer to exercise his own judgment, skill, and experience upon the

¹¹ Mowrey v. Walsh, 8 Cow. 238.

¹² Manning v. Albee, 11 Allen, 520.

¹³ Arnett v. Cloudas, 4 Dana, 300; Cochran v. Stewart, 21 Minn. 435; Harner v. Fisher, 58 Pa. St. 453.

¹⁴ Titcomb v. Wood, 38 Me. 563. Arendale v. Morgan, 5 Sand. 703; Lee v. Portwood, 41 Miss. 109.

¹⁵ Hawse v. Crowe, Ryan & M. 414; Hodgson v. Barrett, 33 Ohio St. 63; Bristol v. Witsmore, 1 B. & C. 514.

¹ Peck v. Gurney, L. R. 6 H. L. Cas. 377; Juzan v. Toulmin, 9 Ala. 662, 44 Am. Dec. 448; Kohl v. Lindley, 39 Ill. 195, 89 Am. Dec. 294; Graffenstein v. Eppstein, 23 Kan. 444, 33 Am. Rep. 171; Mills v. Lee, 6 T. B. Mon. 91, 17 Am. Dec. 118; Graham v. Meyer, 99 N. Y. 611, 1 N. E. Rep. 145.

² West v. Anderson, 9 Conn. 107, 21 Am. Dec. 737. Whitney v. Boardman, 118 Mass. 247; Oliver v. Oliver, 45 S. E. 233 (Ga.).

³ Ante, § 63; Smith v. Hughes, L. R. 6 Q. B. 597; Hart v. Holcombe, 32 N. H. 185; Lew v. Grant, 37 Wis. 548; Dickinson v. Lee, 102 Mass. 559.

qualities of the subject of sale, whatever ought to be the effect upon the transaction, on moral grounds, of such silence, he is not, according to the cases, guilty of legal active fraud.”⁴

A buyer of chattels is not obliged to disclose facts within his knowledge, which would materially affect the negotiation, as for example facts which would enhance their value⁵ or facts which relate to his own ability to pay for them.⁶

So a purchaser of real property is not obliged to disclose a fact which, unknown to the seller, increases its value,⁷ as

⁴ Beninger v. Corwin, 24 N. J. (L.) 266.

⁵ Laidlaw v. Organ, 2 Wheat. 178; Coddington v. Goddard, 82 Mass. 463. Butler's Appeal, 26 Pa. St. 63; Matthews v. Bliss, 22 Pick. 48.

⁶ Where a man buys goods he either expressly or impliedly promises to pay for them. And a promise to pay for goods by a party whose object is to obtain them from the owner with his consent through the form of purchase, when the party knows that he is insolvent and intends never to pay for them, is fraudulent. Donaldson v. Farwell, 93 U. S. 631; Stewart v. Emerson, 52 N. H. 301; Jordan v. Osgood, 109 Mass. 457; Wright v. Brown, 67 N. Y. 1; Oswego Starch Co. v. Lendrum, 57 Iowa 573, 42 Am. Rep. 53. But this intention must be absolute. It is not fraudulent if the intention was only not to pay for them at the time agreed upon, but the party honestly intended to pay for them at some other time. Biedault v. Wales, 20 Mo. 546; Buckley v. Aitcher, 21 Barb. 585. And such fraudulent intention must exist prior to the sale. A subsequent change of mind does not avoid the sale. Burrill v. Stevens, 73 Me. 395; Parker v. Byrnes, 1 How. 537. The reason for the rule as first given is that the promise to pay implies a representation by the party that he has confidence in his ability to pay and really intends to pay, and the concealment of his insolvency with an intention not to pay renders the promise a fraudulent misrepresentation. On the other hand, omission of a purchaser to disclose his insolvency, unaccompanied with an intention not to pay, does not make the promise to pay fraudulent, for it is often the case that the purchaser relies, for his ability to pay, upon his credit alone, and is not disappointed. Morrill v. Blackman, 42 Conn. 324. Nichols v. Pinner, 18 N. Y. 295; Morris v. Talcott, 96 N. Y. 100; Talcott v. Henderson, 31 Ohio St. 162; Illinois Leather Co. v. Flynn, 108 Mich. 91, 65 N. W. Rep. 520. And while a man is really struggling against adversity, with an honest intent to retrieve his fortunes, he may make a valid purchase on credit, although he does not disclose the extent of his embarrassments, for such a case there is wanting the fraudulent design never to pay. Henshaw v. Bryant, 4 Scam. 97; Patton v. Campbell, 70 Ill. 72.

⁷ Fox v. Mackreth, post; Harris v. Tyson, 24 Pa. St. 347, 64 Am. Dec. 661; Laidlaw v. Organ, 2 Wheat. 178; Mactier v. Frith, 6 Wend. 103, 21 Am. Dec. 262; Neill v. Shamburg, 158 Pa. St. 267, 27 Atl. 992.

for instance that there was, unknown to the owner, a mine under the land sold.⁸ So one making a bid for a public work was held to be under no obligation to disclose to the city information as to the cost, which he knew it did not have.⁹

§ 232. *Fiduciary Relations.*

There is a duty to disclose when there is a fiduciary relation between the parties.¹

On the ground of the fiduciary relation of persons entering into an agreement to marry, a promise to marry is voidable on the part of the man where he afterwards discovers that the woman was loose and immoral in her character,² or that she concealed from him the fact that she had previously had a bastard child,³ and on the part of the woman where the man had concealed the fact that he was a professional thief⁴ or was afflicted with a venereal disease.⁵

§ 233. *One Party Relying on Other.*

Not only where the parties stand in fiduciary relations to each other but likewise when one of them knows that the other is relying upon him to tell him all the facts material to the bargain, the latter is under a duty to disclose such facts and the failure to do so has the same effect as an actual

⁸ Fox v. Mackreth, 2 Brown Ch. 420; Smith v. Beatty, 2 Ired. (Eq.) 456, 40 Am. Dec. 435.

⁹ McMuller v. Hoffman, 75 Fed. 547.

¹ See ante, § 224; post, § 264; Akers v. Martin, 61 S. W. 465 (Ky.); McPherson v. Watt, 3 App. Cas. 254; Bagnall v. Carlton, 6 Ch. D. 371. As to the effect of concealment of the value of articles intrusted to a common carrier, see Laws. Bail., § 133.

² Butler v. Eischelman, 18 Ill. 44; Palmer v. Andrews, 7 Wend. 143; Foster v. Hanshett, 35 Atl. 316 (Vt.). But aliter where he knew of her lewd character when he made the promise. Kelly v. Highfield, 15 Ore. 277.

³ Bell v. Eaton, 28 Ind. 468, 92 Am. Dec. 329.

⁴ Keyes v. Keyes, 26 N. Y. 910.

⁵ C. v. C., 158 Wis. 301, 148 N. W. 865 and note in 5 A. L. R. 1022.

representation.¹ Thus it is held in a number of cases that where a landlord lets premises, having upon them a nuisance prejudicial to life or health, it is his duty to inform the tenant of the existence of the nuisance,² as for example that the premises are infected with disease,³ that a well is contaminated,⁴ that the house had been used for purposes of prostitution,⁵ that its condition would be likely to endanger the health of its occupants.⁶ While the failure to reveal such facts may not amount to actual fraud, it may be such negligence as to warrant an action for damages if injury occurs.⁷

So if an employer knows, when he accepts a bond given to secure the faithful performance of the duties of an agent, that the agent is a defaulter, he must not conceal the fact from the sureties.⁸

A number of American decisions extend this principle to all cases where the seller knows of a material latent defect or one which an ordinary person by examination would not be likely or able to discover,⁹ as for example when to the knowledge of the vendor, poison has been spilled upon hay,¹⁰ or

¹ 9 Cyc. 410, 13 C. J. 381.

² *Caesar v. Karutz*, 60 N. Y. 229; *Minor v. Sharon*, 112 Mass. 477; *Lucas v. Cautler*, 104 Ind. 81; *Fisher v. Lighthall*, 4 Mackey (D. C.) 82, 54 Am. Rep. 258; *Maywood v. Logan*, 78 Mich. 135, 18 Am. St. Rep. 431; *Meeks v. Bowerman*, 1 Daly 100.

³ *Cutler v. Hamlen*, 147 Mass. 471, 18 N. E. 397; *Davis v. Smith*, 26 R. I. 129.

⁴ *Maywood v. Logan*, 78 Mich. 135, 43 N. W. 1052.

⁵ *Rhineland v. Seaman*, 13 Abb. N. C. 455.

⁶ *Ash v. Meeks*, 118 N. Y. S. 821; *Kern v. Myll*, 80 Mich. 525, 45 N. W. 587.

⁷ *Cowan v. Sutherland*, 145 Mass. 363, 14 N. E. 117.

⁸ *Guardian Ins. Co. v. Thompson*, 68 Cal. 208.

⁹ *McAdams v. Cates*, 24 Mo. 223; *Brown v. Montgomery*, 20 N. Y. 287, 75 Am. Dec. 404; *Hadley v. Clinton Co.*, 13 Ohio St. 502, 82 Am. Dec. 454; *Cecil v. Spurger*, 32 Mo. 462, 82 Am. Dec. 140; *Loewer v. Harris*, 57 Fed. 368.

¹⁰ *French v. Vining*, 102 Mass. 135.

animals are diseased,¹¹ or animals purchased for breeding purposes are impotent.¹² These cases are sustainable on the ground that when the means of information are not equally accessible to both parties, the one having them must be presumed to know that the other is relying upon him to make no concealment of what he cannot discover, and is well expressed in a recent case where an agreement was entered into between the master of a tug and the master of a disabled steamship, the former suppressing the fact that the owners of the steamship had already employed another tug to tow it to port. In setting aside the agreement, the court says:

“The case of information possessed by one party and absolutely unobtainable by the other, though of rarer occurrence, is one in which the enforcement of the rule of good faith is fully as imperative. . . . It is perhaps not properly an exception to the doctrine of *caveat emptor*, but rather a case outside of its terms. The purchaser cannot look out for what he cannot have knowledge of. . . . Under this exception, more logically than under that of special confidence, where it is generally placed in the text-books, comes the obligation of one who has manufactured goods to reveal to a purchaser any latent defect in them known to himself, and the similar obligation of a vendor of real estate to inform a vendee of all incumbrances placed by himself upon the land. Where one party to a contract has information inaccessible to the other, neither of the reasons assigned for the principle of *caveat emptor* applies. The contract is not one which should be sustained to encourage mercantile competition and diligence; for, where knowledge cannot be obtained, competition is impossible and diligence useless, there can be no vigilance to be rewarded or sloth to be discouraged.”¹³

§ 234. *Active Concealment—Misleading Statements.*

The active concealment of a fact has the same effect as

¹¹ *Gregsby v. Stapleton*, 94 Mo. 423.

¹² *Maynard v. Maynard*, 49 Vt. 297.

¹³ *The Clandeboye*, 70 Fed. 636; and see *Witherwax v. Riddle*, 121 Ill. 140, 13 N. E. Rep. 545.

false representation.¹ By an active concealment is meant a representation true as far as it goes, but accompanied with such a suppression of facts as makes it convey a misleading impression, for in this case the non-disclosure has the effect of impliedly representing that the fact concealed does not exist, or of rendering the facts disclosed absolutely false.²

“Supposing you state a thing partially, you may make as false a statement as much as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you may make a false statement. For instance, if pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement.”³

Thus where a woman told a man that she had obtained a divorce from her former husband but failed to say that he had also, on his cross-bill, obtained a divorce from her, it was held that this was such a fraud as would justify him in refusing to carry out his agreement to marry her.⁴ The same conclusion was reached where a purchaser of goods on credit, on being questioned as to his financial condition, stated his assets correctly, but did not disclose all his liabilities⁵ and where the promoter of a corporation represented, as an inducement to a subscription to the capital stock, that a certain person of reputation for business sagacity had agreed to subscribe for a large amount of the stock, without disclosing

¹ *Turner v. Harvey*, Jacob 178; *Boswell v. Coaks*, 27 Ch. Div. 424, 11 App. Cas. 232; *Gilbert v. Endean*, 9 Ch. Div. 259; *Prescott v. Wright*, 4 Gray 461; *Dambmann v. Schulting*, 75 N. Y. 62; *Beard v. Campbell*, 2 A. K. Marsh. 125, 12 Am. Dec. 362; *Hanks v. McKee*, 2 Litt. 227, 13 Am. Dec. 265.

² *Peek v. Gurney*, L. R. 6 H. L. 377; *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172; *Baker v. Seahron*, 1 Swan 54, 55 Am. Dec. 724; *Stewart v. Wyoming Co.*, 128 U. S. 388; *Croyle v. Moses*, 90 Pa. St. 250, 35 Am. Rep. 654.

³ *James, L. J.*, in *Arkwright v. Newbold*, 7 Ch. Div. 318.

⁴ *Van Houten v. Morse*, 162 Mass. 414, 38 N. E. Rep. 705.

⁵ *Newell v. Randall*, 32 Minn. 171, 19 N. W. Rep. 972, 50 Am. 562; *Childs v. Merrill*, 63 Vt. 463, 22 Atl. 626.

the fact that the stock had been given such person as a gratuity for the use of his name.⁶

§ 235. *Same—Covering Up.*

In like manner where one of the parties draws the other's attention from the fact or covers it from view, the silence becomes equivalent to a representation.¹ Thus where a person in order to sell a log of mahogany turned it over so as to conceal a hole in the under side this was held a fraud on the buyer² and where a person sold a vessel with all faults, and, before the sale, had taken her from the ways on which she lay and placed her afloat in a dock for the purpose of preventing an examination of the bottom, which he knew to be unsound, it was held that the buyer was entitled to avoid the sale.³

(b) Representation of Fact.

§ 236. *Matters of Opinion.*

The representation must be of a matter of fact, for a mere expression of opinion, which turns out to be unfounded, will not invalidate a contract.¹ An illustration of the difference between opinion and representation is found in the difference between the vendor of property saying that it is worth so much, and his saying that he gave so much for it. The first

⁶ Coles v. Kennedy, 81 Ia. 360, 40 N. W. 1088.

¹ Bagehole v. Walters, 3 Camp. 154; Maynard v. Maynard, 49 Vt. 297; Beninger v. Corwin, 24 N. J. (L.) 258; Jackson v. Collins, 39 Mich. 557; Savage v. Stevens, 126 Mass. 207; Morris v. McGough (Tex.), 230 S. W. 1092.

² Udell v. Atherton, 7 H. & N. 172, 30 L. J. Ex. 337.

³ Schneider v. Heath, 3 Camp. 506.

¹ Nauman v. Oberle, 90 Mo. 666, 3 S. W. 380; Moore v. Scott, 47 Neb. 346, 69 N. W. 441; Sheldon v. Dandson, 85 Wis. 138.

is an opinion which the buyer may adopt if he will,² the second is an assertion of fact which, if false to the knowledge of the seller, is fraudulent.³ Thus to say that the subject-matter of the sale was "good oil land,"⁴ or that a patent was a valuable or useful improvement,⁵ or that certain land was suitable for building purposes,⁶ is not fraudulent; while to say that a business is profitable,⁷ or that an old stock of goods was "fresh and new,"⁸ or that a building is "fireproof,"⁹ or that a furnace will heat a house,¹⁰ or that farm land is in good condition,¹¹ or that a rival seller will sell for less, is.¹²

But here as in former cases where the relation of the parties is fiduciary or one is relying upon the other, the opinion will be treated as a fact.

"It is no doubt true that, as between seller and buyer, statements of value by the former ought not to be taken as trustworthy by the latter, and that the law will not help a purchaser who accepts exaggerated or false statements of value made by a vendor; but this rule does not hold good where a confidential relation exists between the parties, or where one

² *Nowlan v. Cain*, 3 Allen, 263; *Noetting v. Wright*, 72 Ill., 390; *Gordon v. Butler*, 105 U. S. 553; *Ellis v. Andrews*, 56 N. Y. 83, 15 Am. Rep. 379; *Cooper v. Lovering*, 106 Mass. 79; *Holbrook v. Connor*, 60 Me. 578, 11 Am. Rep. 212; *Anderson v. McPike*, 86 Mo. 294.

³ *Harvey v. Young*, Yelv. 20; *Lindsay Pet. Co. v. Hurd*, L. R. 5 C. P. 243; *Ives v. Carter*, 24 Conn. 403; *Chrysler v. Canaday*, 90 N. Y. 272, 43 Am. Rep. 166; *Teachout v. Van Hoesen*, 76 Iowa, 113, 40 N. W. Rep. 96; *Burns v. Schnellbacher*, 163 Ill. 328, 46 N. E. Rep. 227. But see *Mackenzie v. Seeberger*, 76 Fed. 108.

⁴ *Watts v. Cummins*, 59 Pa. St. 84; *Dimmock v. Hallett*, L. R. 2 Ch. 21; *Lee v. McClelland*, 120 Cal. 147, 52 Pac. Rep. 300.

⁵ *Bain v. Wiley*, 107 Ala. 223, 18 South. Rep. 217.

⁶ *Wren v. Moncure*, 95 Va. 369, 28 S. E. Rep. 588; *Lake v. Tyree*, 90 Va. 719; *Rendell v. Scott*, 70 Cal. 514, 11 Pac. Rep. 779.

⁷ *Tiedeman on Sales*.

⁸ *Jackson v. Collins*, 39 Mich. 557; *Strand v. Griffith*, 97 Fed. Rep. 854.

⁹ *Hickey v. Menell*, 102 N. Y. 824, 55 Am. Rep. 824.

¹⁰ *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123.

¹¹ *Woodward v. West Canada Co.*, 158 N. W. 706 (Minn.); *O'Neil v. Wiseman*, 39 Tex. Civ. App. 592, 88 S. W. 290.

¹² *Smith v. Smith*, 166 Pa. St., 563, 31 Atl. 344.

of the parties professes to have special knowledge of the value of the property, and of which the other, being ignorant, to the knowledge of the former, trusts to his good faith. In both of these cases representations of value may be treated as representations of fact."¹³

§ 237. *Commendatory Expressions—Puffing.*

Commendatory expressions, such as men habitually use in order to induce others to enter into a bargain, are not dealt with as serious representations of fact. A certain latitude is allowed a man who wants to gain a purchaser.¹

§ 238. *Matters of Intention or Expectation.*

An expression of intention or expectation is not a statement of fact;¹ therefore false promises of the vendor to do something in the future for the vendee as well as false representations as to what he intends to do in making improvements in the neighborhood or as to what the vendee could do with the property do not constitute fraud.² But when it is clear that the statement of intention was absolutely false at the time it was made, then it is treated like any other statement of fact, the distinction being made between a representation which the party intends to perform and one which he intends to break. In *Edington v. Fitzmaurice*,³ the directors of a company in a prospectus inviting subscriptions for debentures to be issued by the company, falsely stated that

¹³ *Baun v. Holton*, 4 Colo. App. 506, 36 Pac. 154; *Poole v. Camden*, 92 S. E. 454 (W. Va.).

¹ *Tiedeman Sales*, § 166.

¹⁹ Cyc. 418, 13 C. J. 386.

² *Dawe v. Morris*, 149 Mass. 188, 21 N. E. 313; *Smith v. Smith*, 166 Pa. St. 565, 31 Atl. 344; *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161; *Day v. Ft. Scott Co.*, 153 Ill. 293, 38 N. E. 567; *Frost v. Thomas* (Tex. Civ. H.), 238 S. W. 305.

³ 29 Ch. Div. 459; *Old Colony Trust Co. v. Dubuque Light Co.*, 89 Fed. 794.

the objects of the issue were to complete alterations in the buildings of the company, to purchase horses and vans, and to develop the trade of the company, when the real object was to raise money to pay off pressing liabilities. Said the court:

“It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the defendants liable to the plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact. . . . A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.”

A statement in an application for an insurance on a house, that the house is unoccupied, but is to be occupied by a tenant, is not a warranty either that the house will remain occupied or that it will be occupied by a tenant.⁴ So a policy is not avoided by the fact that a quantity of rags was in the premises insured at the time of the fire, where the applicant represented that no rags were kept in or near the premises, it not appearing that the representation was untrue when made.⁵

§ 239. *Matters of Law.*

False representations of law or of the legal effect of a contract will not sustain an action of deceit or justify a court in

⁴ *Hughes v. Ins. Co.*, 27 Conn. 10; *O'Neill v. Ins. Co.*, 3 N. Y. 122; *Herrick v. Ins. Co.*, 48 M. E. 558, 77 Am. Dec. 244; *Hough v. Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581.

⁵ *Gould v. Ins. Co.*, 47 Me. 403, 74 Am. Dec. 495.

rescinding a contract.¹ But it is different where some relation of confidence and trust exists between the parties, or where one, by reason of his ignorance or unfamiliarity with business, was compelled to rely and does rely on the superior knowledge of the other.² But a statement of fact which involves a conclusion of law is a statement of fact.³

“A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law. Suppose a man is asked by a tradesman whether he can give credit to a lady, and the answer is, ‘You may, she is a single woman of large fortune.’ It turns out that the man who gave that answer knew that the lady had gone through the ceremony of marriage with a man who was believed to be a married man, and that she had been advised that that marriage ceremony was null and void, though it had not been declared so by any court, and it afterwards turned out that they were all mistaken, that the first marriage of the man was void, so that the lady was married. He does not tell the tradesman all these facts, but states that she is single. That is a statement of fact. If he had told him the whole story, and all the facts, and said, ‘Now, you see, the lady is single,’ that would have been a misrepresentation of law. But the single fact he states, that the lady is unmarried, is a statement of fact, neither more nor less; and it is not the less a statement of fact, that in order to arrive at it you must know more or less of the law.”⁴

¹ 9 Cyc. 420, 13 C. J. 286; *Weeks v. Metcalf*, 83 Or. 687; 163 Pac. 434.

² *White v. Harrigan*, 186 Pa. 224 (Okla.). The facts concerning a title being known to both parties, a misrepresentation by one of them as to the law affecting the title is not a legal fraud. *Pickrell Co. v. Castleman Co.*, 174 Ky. 1, 191 S. W. 680. But when such misstatement of law is accompanied by concealment or misrepresentation of fact, it will amount to fraud. *Herman v. Hall*, 140 Mo. 270, 41 S. W. 733. *Holt v. Gordon*, 176 S. W. 902.

³ *Motherway v. Wali*, 168 Mass. 333, 47 N. E. 135; *Burns v. Lane*, 138 Mass. 350; *Ross v. Drinkard*, 35 Ala. 434.

⁴ *Jessel, M. R., in Eaglesfield v. Londonderry*, 4 Ch. Div. 693.

A representation as to a private act or a statute of another state is a representation of facts.⁵

(c) By Party Charged.

§ 240. *Fraud of Third Party.*

The representation must have been made by the party to the agreement or by his agent or with his connivance or consent¹ for an agreement is not affected by the fraud of a third person in which the other party was not implicated.² "There is no case in which a fraud intended by one man shall overturn a fair and bona fide contract between two others."³

(d) Knowledge of Falsehood.

§ 241. *Representation Believed to Be True.*

A representation made with a belief in its truth, though not true in point of fact, is not a legal fraud,¹ though as we have seen if it is of a material fact, and induces the contract by one relying on it, it is, even when innocently made, a good ground for setting aside the contract in equity or refusing specific performance.²

⁵ Laws. Pres. Ev. Rule 2; Wood v. Roeder, 50 Neb. 476, 70 N. W. 21; Bethell v. Bethell, 92 Ind. 318.

¹ Slim v. Croucher, 2 Giff. 37; Briggs v. Dunne, 168 Ill. 226, 48 N. E. 48; Kujek v. Goldman, 150 N. Y., 176. See v. See (Mo.), 237 S. W. 795.

² Adams v. Soule, 33 Vt. 538; Witherwax v. Riddle, 121 Ill. 140, 13 N. E. 545. Brooks v. Dick, 135 N. Y. 652, 32 N. E. 230.

³ Master v. Miller, 4 T. R. 337.

¹ Ormrod v. Huth, 14 M. & W. 664; Cowley v. Smyth, 46 N. J. L. 380; Wakeman v. Dalley, 51 N. Y. 27; Griswold v. Sabin, 51 N. H. 167, 12 Am. Rep. 76; Mamlock v. Fairbanks, 46 Wis. 415, 32 Am. Rep. 716.

² Ante, § 227.

§ 242. *Representation Known to Be False.*

If a representation is made with knowledge that it is false it is always fraudulent and it is not essential that the party making it had any bad intent or motive or intended to cheat.¹ In *Polhill v. Walter*,² the defendant accepted a bill of exchange drawn on another person representing that he had authority from the other to accept, honestly believing that his act would be ratified and the bill paid by him. The bill was not paid and an indorsee for value, who had relied on his representation, was held to be entitled to sue him in an action of deceit. The court saying:

“If, then, the defendant, when he wrote the acceptance, and, thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and upon the evidence there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the plaintiff for the damage sustained in consequence. If the defendant had had good reason to believe his representation to be true, as, for instance, if he had acted upon a power of attorney which he supposed to be genuine, but which was, in fact, a forgery, he would have incurred no liability, for he would have made no statement which he knew to be false: a case very different from the present, in which it is clear that he stated what he knew to be untrue, though with no corrupt motive.”

So where A in answer to B's letter asking him if he could recommend one C as a responsible tenant replied that he had “much pleasure in replying affirmatively,” although he knew C to be a man of no resources, and that he had more than once failed in business similar to the one he now wished to enter into, it was held that it was of no consequence that what

¹ *Morris v. Posner*, 111 Ia. 335, 82 N. W. Rep. 755; *Peek v. Gurney*, L. R. 6 H. L. 409.

² 3 B. & Ad. 114.

A had said was out of mere kindness and with no idea of making anything out of it, or even of deliberately deceiving.³

§ 243. *Representation Not Known or Believed to Be True.*

Where persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they are as responsible as if they had asserted that which they knew to be untrue. Whether a party misrepresenting a fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is as unjustifiable as the affirmation of what he knows to be false.¹

§ 244. *Belief Based on Unreasonable Grounds.*

If the representation is believed in, it does not make it fraudulent that it is not founded on reasonable grounds. But the absence of reasonable grounds for the belief may be some proof that the belief was not honestly entertained.¹

This principle is well stated by the House of Lords in the leading English case thus:

“In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed, though on insufficient grounds. . . . At the same time, I desire to say distinctly that when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon

³ *Leddell v. McDougall*, 29 W. R. 403.

¹ 9 Cyc. 422; 13 C. J. 388.

¹ 9 Cyc. 423; 13 C. J. 290. Some courts hold, however, that a positive statement of a fact within one's means of knowledge implies that he has knowledge and that therefore the statement if false is fraudulent. 9 Cyc. 423; 13 C. J. 290.

which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one.”²

§ 245. *Representation Subsequently False or True.*

A representation not known to be false when made, but discovered to be false before the contract induced by it is sought to be enforced, is fraudulent.¹

Thus concealment by the owner of a business enterprise of a decline in its profits between the date of his agreement to sell and the signing of the contract of sale was held actionable, when the purchaser had no opportunity of discovering the decline, and had agreed to buy on the faith of representations as to the prior rate of profit, telling the seller that he would not buy if there had been a decline.²

(e) Intention that it Be Acted Upon.

§ 246. *Representation Made Without Such Intention.*

The representation must be made with the intention that it shall be acted on by the injured party.¹ Where the directors of a company made false representations in their prospectus asking for original subscriptions to the stock, it was held that their liability did not extend beyond the first applicants, so as to include persons who subsequently purchased shares which came into the market, the ground of this decision being

² Lord Herschell in *Peek v. Derry*, 14 App. Cas. 375.

¹ *Reynall v. Sprye*, 1 De G. M. & G. 660; *Brownlie v. Campbell*, 5 App. Cas. 950; *Cable v. Ins. Co.*, 111 Fed. 19; *Guilford v. School Tp.*, 62 N. E. 711 (Ind.).

² *Loewen v. Harris*, 57 Fed. Rep. 368.

¹ 9 Cyc. 424; 13 C. J. 389.

that their intention to deceive could not be supposed to extend beyond the first applicants for shares.²

But the representation need not be made directly to the injured party if it was nevertheless the intention that it should be acted upon by him.³

(f) Must Be Relied On.

§ 247. *Representation Must Have Induced Agreement.*

The person to whom the representation is made must have been induced by it to enter into the agreement; in other words he must not have known the truth, must have believed the representation and it must have been a material inducement to his act.

§ 248. *Knowledge of Untruth.*

A representation which the other party does not believe to be true or knows to be untrue cannot have induced the contract and will not be allowed to avoid it.¹ Where the condition of leased premises is as apparent to the tenant as to the landlord there is no duty to disclose.² So where the means of knowledge are within one's power and close at hand he will be presumed to have had such knowledge;³ as in an old case where a person induced another to carry goods for him at so much per hundred-weight, by a false statement of the weight of the goods, this was held no fraud, because

² Peek v. Gurney, L. R. 6 H. L. 377, 410.

³ See post, § 351.

¹ 9 Cyc. 428, 13 C. J. 392, 35 Am. Dec. 435; Anderson v. Burnett, 5 How. (Miss.) 165; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Foy v. Haughton, 83 N. C. 467; Kelley v. Highfield, 15 Oreg. 277, 14 Pac. Rep. 744; Wegefarrh v. Wiessner, 107 Atl. 364 (Md.).

² Mullen v. Rainear, 45 N. J. L. 520; Blake v. Dick, 15 Mont. 236, 38 Pac. 1072.

³ 9 Cyc. 428; 13 C. J. 392.

the carrier might have ascertained the correct weight for himself.⁴ In another case a farm was sold under the description of being in a "ring-fence." The purchaser saw the farm before the purchase, had lived in the neighborhood, and must have known whether it did lie in a ring-fence or not. It was held that he was liable on the contract, notwithstanding the farm was so misdescribed.⁵

"Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and has been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained."⁶

Ordinarily it is the duty of a purchaser of land to inspect it and not rely on the statements of the seller as to its quality and condition⁷ unless some fraud or artifice is practised on him to induce him not to do so⁸ or he resides a distance from the land.⁹

We have already seen an application of this principle in the rule that one who can read and signs a contract without reading it, cannot complain that the other party misrepresented its contents.¹⁰

⁴ Bayley v. Merrill, Cro. Jac. 386; Berry v. Land Co. (Tex. Co. A), 236 S. W. 550.

⁵ Dyer v. Hargrave, 10 Ves. 505.

⁶ Mr. Justice Field, in Slaughter v. Gerson, 13 Wall. 379.

⁷ Taylor v. Fleet, 4 Barb. 95; Woods v. Hall, 16 N. C. 411.

⁸ Thompson v. Boyce, 84 Ga. 497, 11 S. E. 353.

⁹ Danielso nv. Skidmore, 189 S. W. 57 (Ark.); Petrie v. Clark, 126 Minn. 119, 147 N. W. 1097.

¹⁰ See ante, § 206.

But on the other hand there are cases holding that where a person in fact relies upon the representation, as intended by the party making it, he may be entitled to avoid the agreement, notwithstanding he had the means of information, of which he did not avail himself.¹¹ And in general, where a false representation is in fact made, the burden of proof lies upon the party making it to show not only that the other party had the means of information, but that he relied upon his own information or judgment, and was not in fact misled by the representation.¹²

§ 249. *Belief and Reliance.*

Such representations as one obviously did not believe in and such false statements or concealments as he did not rely upon, are immaterial.¹ Of the first kind are what is often called "dealers talk" *i. e.*, representations amounting merely to commendatory expressions or exaggerated statements as to value, prospects, and the like, as where a seller puffs up the value and quality of his goods, or a man, to induce another to contract with him, holds out flattering prospects of gain and which are not such statements as reasonable men are in

¹¹ *Dobell v. Stevens*, 2 B. & C. 623; *Brett v. Van Auken*, 99 Ia. 553, 68 N. W. 891; *Lewis v. Jewell*, 151 Mass. 345, 24 N. E. 52, 21 Am. St. Rep. 454; *Tacoma v. Tacoma Light, etc., Co.*, 17 Wash., 458, 50 Pac. 55; *Cottrill v. Krum*, 100 Mo. 397, 13 S. W. 753.

¹² *Lysney v. Selby*, 2 Ld. Ray. 1118; *Holbrook v. Burt*, 22 Pick. 546; *Fishback v. Miller*, 15 Nev. 428; *Lewis v. Jewell*, ante.

¹ In *Horsfall v. Thomas*, 1 H. & C. 90, the defendant had bought a cannon of the plaintiff. The cannon had a defect which made it worthless, and the plaintiff had endeavored to conceal this defect by the insertion of a metal plug in the weak spot in the gun. The defendant never inspected the gun; he accepted it, and upon using it for the purpose for which he bought it the gun burst. It was held that the attempted fraud having had no operation upon the mind of the defendant did not exonerate him from paying for the gun. "If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun or form any opinion as to whether it was sound, its condition did not affect him."

the habit of relying upon in making up their minds to enter into the agreement.² So whenever a person notwithstanding the representation of another relies upon his own judgment of the matter or the judgment of a third party or on investigation or examination which he has made for himself and gives no weight to the representation, it cannot be said that he was injured by it and hence it is no fraud as to him.³

§ 250. *As to One of Several Matters.*

A false representation as to one of several material matters or a representation including several matters that is false in one material point, is sufficient to vitiate the whole agreement.¹ The fraudulent representation need not have been the sole inducement to the making of the agreement provided, but for it, the agreement would not have been made.² And although the false representation affects part only of the agreement it in general vitiates it *in toto*.³

§ 251. *Materiality.*

The representation must be material—that is, it must have been the inducement to the making of the agreement and it is not enough that it may have remotely or indirectly contributed to the transaction, or may have supplied a motive to

² Lockwood v. Fitts, 90 Ala. 150, 7 South. Rep. 467; Dillman v. Nadlehoffer, 119 Ill. 567, 7 N. E. 88; Burns v. Mahannah, 39 Kan. 87, 17 Pac. 319; Deming v. Darling, 148 Mass. 504, 20 N. E. 107; Southern Development Co. v. Silva, 125 U. S. 247. See ante, § 237.

³ Brown v. Gray, 6 Jones 103, 72 Am. Dec. 563; Slaughter v. Gerson, 13 Wall. 379; Priest v. White, 89 Mo. 609; Anderson v. McPike, 86 Mo. 294; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161; Dady v. Condit, 163 Ill. 511, 45 N. E. 224.

¹ Reynell v. Surve, 21 L. J. Ch. 660; Hollows v. Fernie, L. R. 3 Eq. 539, 36 L. J. Ch. 273.

² Ruff v. Jarrett, 94 Ill. 475; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Safford v. Grout, 120 Mass. 20; Morgan v. Skiddy, 62 N. Y. 819; Peek v. Derry, 37 Ch. D. 541.

³ Lawson Rights, Rem. & Pr., § 2356.

the other party to enter into it. It must appear that the contract would not have been made but for it.¹ Therefore the representation was held immaterial, where the buyer of goods, in negotiating the purchase, alleged falsely, as the reason for the limited amount of his offer, that his partner would not consent to his giving more,² and where upon the negotiation for a loan of money, the lenders represented that it was lent by a joint-stock loan company, but in fact it was lent by themselves only, who called themselves the company, which did not otherwise exist, for in the first case the real inducement to the seller was the money offered and in the second the real inducement to the borrower was the advance of the money.³ And a representation, made after a sale is completed cannot affect it.⁴

(g) Damage to Party Deceived.

§ 252. *Damage Essential.*

If the party deceived has suffered no damage by the misrepresentation of the other, there is no fraud which will sustain an action against the latter or will entitle him to avoid his agreement.¹

It is no fraud to induce a debtor by a misrepresentation to pay his just debt.² And it has been held that a sale could

¹ *Connersville v. Wadleigh*, 7 Blackf. 102, 41 Am. Dec. 214; *Adams v. Schiffer*, 11 Colo. 15, 17 Pac. Rep. 21, 7 Am. St. Rep. 202; *Holst v. Stewart*, 161 Mass. 516, 37 N. E. 755, 42 Am. St. Rep. 442; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805; *Powell v. Adams*, 98 Mo. 598, 12 S. W. Rep. 295; *Sheldon v. Davidson*, 85 Wis. 138, 55 N. W. 161.

² *Vernon v. Keyes*, 12 East. 632; *Trusts Co. v. Assur. Co. (Alta.)*, 159 Alta. L. 546.

³ *Green v. Gosden*, 5 Jur. 1010.

⁴ *Cady v. Walker*, 62 Mich. 157, 4 Am. St. Rep. 834.

¹ 9 Cyc. 431; 13 C. J. 394. See an anomalous case in Connecticut where damage was done not to the plaintiff but to third parties; and the contract was nevertheless set aside. *Brett v. Cooney*, 53 Atl. Rep. 728.

² *Marsh v. Cook*, 32 N. J. Eq. 362.

not be avoided by the purchaser because of the seller's false representation that there was no mortgage thereon, where the seller afterwards had the mortgage released.³ So where a company issued a prospectus falsely representing that more than half the capital had been subscribed, by which a person was induced to apply for shares, the representation not being true at the time the prospectus was issued, but having become true at the time of his application, there was no misrepresentation entitling him to relief.⁴

“A mere fraudulent representation is not actionable *per se*. If a man utter slanderous words of his neighbor, the neighbor may have his action, though he be not damaged by the words spoken. If a man, upon a valuable consideration, promise to another that he will do any given thing, and fail to perform his promise, an action lies for the breach of promise, though no damage be done. Not so in an action for fraudulent representations. In such action, the plaintiff must not only show that the representations were made, and that they were false and fraudulent, but he must also show, affirmatively, that he has been injured thereby—that he is, in some way, in a worse condition than he would have been had the words been true.”⁵

(h) REMEDIES.

§ 253. *Remedies of Party Defrauded—Election to Affirm.*

On discovering the fraud an election is given to the party defrauded.¹ An agreement procured by fraud is voidable, not void,² and hence one may affirm the contract and sue in tort for such damages as the fraud has occasioned, or set up

³ Johnson v. Seymour, 79 Mich. 156, 44 N. W. 344.

⁴ Ship v. Crosskill, L. R. 10 Eq. 73

⁵ Bartlett v. Blaine, 83 Ill. 24.

¹ Pryor v. Foster, 130 N. Y. 171, 29 N. E. 123.

² Smith v. Hornback, 4 Litt. 232, 14 Am. Dec. 122; McCorkle v. Doby, 1 Strobb. 396, 47 Am. Dec. 560; Brown v. Pierce, 97 Mass. 46, 93 Am. Dec. 57.

such damages as a defense or by way of counterclaim if sued on the contract by the other party.³

He is not barred from suing for the fraud because after discovering the fraud he performed his part of it. By performing he ratifies the contract and cannot afterwards disaffirm it; but his right of action for the fraud remains.⁴ But like any other right this right of action may be waived. While a party may retain what he received, stand to his bargain, and recover for the loss caused him by the fraud, yet.

“Where a party with full knowledge of all the material facts does an act which indicates his intention to stand to the contract and waive all right of action for the fraud, he cannot maintain an action for the original wrong practiced upon him. Where the affirmance of the contract is equivalent to a ratification, all right of action is gone It is only equivalent to a ratification when made with full knowledge of the fraud and of all material facts, and with the intention of abiding by the contract, and waiving all right to recover for the deception.”⁵

A waiver does not require a consideration to be binding. It takes place in consequence of laches or by acting inconsistently with the idea of enforcing a right.⁶

§ 254. *Rescission of Contract.*

The party defrauded may rescind the contract and having done so resist an action brought upon it;¹ or resist specific

³ *Houldsmith v. City of Glasgow Bank*, 5 App. Cas. 323; *Queen v. Saddlers Co.*, 10 H. L. Cas. 421; *Whitney v. Allaire*, 1 Hill, 484, 1 N. Y. 305; *Miller v. Barber*, 66 N. Y. 558; *Cook v. Soule*, 56 N. Y. 420; *Ettlinger v. Nat. Surety Co.*, 221 N. Y. 867, 117 N. E. 945.

⁴ *Whitney v. Allaire*, 4 Denio, 551; *Parker v. Marquis*, 64 Mo., 38; *Nauman v. Oberle*, 90 Mo. 666; *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. Rep. 123.

⁵ *St. John v. Hendrickson*, 81 Ind. 350.

⁶ *Griffith v. Gilliam*, 31 Mo. (App.) 33.

¹ *Union Dist. v. Boomhour*, 83 Ill. 17; *Jones v. Emery*, 40 N. H. 348; *Mead v. Bunn*, 32 N. Y. 275; *Harran v. Klaus*, 79 Wis. 383, 48 N. W. 479. At common law a person could not plead fraud in an action

performance when sought in equity;² or obtain a cancellation of the contract in equity;³ or recover the property itself.⁴

§ 255. *Limits to Right to Rescind.*

While a man may keep the contract open till he is sued upon it, and a plea of fraud then set up is a sufficient rescission of the contract,¹ yet so long as he keeps it open he does so at his own risk. His right to avoid it may be lost either by his accepting some benefit under the contract, or otherwise acting upon it after he has become aware of the fraud;²

on an instrument under seal, but resort must have been had to a court of equity to set the deed aside. The rule is changed in most of the states where a plea of fraud to a sealed instrument is good. See 9 Cyc. 434.

² McShane v. Hazelhurst, 50 Md. 107; Chute v. Quincy, 156 Mass. 189, 30 N. E. 550; Friend v. Lamb, 152 Pa. St. 529, 25 Atl. 577; 34 Am. St. Rep. 672; Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139; Smith v. Smith, 23 Wis. 176, 99 Am. Dec. 153.

³ Wilson v. Carpenter, 91 Va., 183, 21 S. E. 243. Or ask for reformation. Rensing v. Wiggers, 99 Iowa, 39, 68 N. W. 569; West v. West, 96 Iowa, 41, 57 N. W. 639.

⁴ Thurston v. Blanchard, 22 Pick. 18, 33 Am. Dec. 700; Moody v. Blake, 117 Mass. 23, 19 Am. Rep. 394; Baker v. Dinsmore, 72 Pa. St. 427, 13 Am. Rep. 697; Cary v. Hotaling, 1 Hill, 311, 37 Am. Dec. 323; Sleeper v. Davis, 64 N. H. 59, 10 Am. St. Rep. 377. The vendor may reclaim his goods against all persons except bona fide purchasers for value. Atwood v. Dearborn, 1 Allen, 438, 79 Am. Dec. 755; Manning v. Ablee, 14 Allen, 7, 92 Am. Dec. 736; Farley v. Lincoln, 51 N. H. 577, 12 Am. Rep. 182; Barnard v. Campbell, 58 N. Y. 73, 17 Am. Rep. 208.

¹ The right for example to rescind for fraud is not defeated by the vendor's having obtained judgment for the price in ignorance of the fraud. Kraus v. Thompson, 30 Minn. 64, 44 Am. Rep. 182.

² Fleming v. Hanley, 21 R. I. 141, 42 Atl. Rep. 521; Estes v. Reynolds, 75 Mo. 563; Dellinger v. Gillaspie, 118 N. C. 737, 24 S. E. Rep. 538; Hutton v. Dearing, 42 W. Va. 691, 26 S. E. 197. If he rescind, he must do so immediately upon the discovery of the fraud; and if he continue the use and occupation of the property received under the contract he will be deemed to have elected to affirm it. Strong v. Strong, 102 N. Y. 69; Schiffer v. Dietz, 83 N. Y. 300. The vendor of goods on rescinding the sale for fraud, may maintain replevin for them (Bussing v. Rice, 2 Cush. 38; Bank v. Bates, 120 U. S. 556; Beebe v. Hatfield, 67 Mo. App. 609; Morrow Shoe Mfg. Co. v. New England Shoe Co., 57 Fed. 685), or he may, where he cannot obtain

or by his unreasonable delay in asking for equitable relief after he has knowledge or means of knowledge of the fraud which delay in equity is called laches;³ or by his being unable to put the other party in his former position;⁴ or by innocent third parties acquiring an interest for value under the contract.⁵

One who has agreed to do work for a certain price, through a fraudulent representation, may on discovering the fraud repudiate the contract and sue for damages,⁶ but he is excused from rescinding on discovering the fraud where he has so far performed before ascertaining the facts that it is not practical to cease performance.⁷

§ 256. *Restoring the Consideration.*

It follows from the rule that the parties must be put in

complete relief in a single action, obtain relief in equity, which will treat the fraudulent vendee as a trustee. Thus in an action to enforce a constructive trust in broom corn complained by complainant to have been sold and delivered under false representations of the buyer, it was alleged that part of the broom corn which had not been worked up by the buyer, had been mingled with other corn, and was difficult of identification; that the property had been twice sold, and the rights of the alleged purchaser would be the subject of investigation; and that part of the corn had been manufactured and assigned to third persons, who were acting in collusion with the alleged trustees. Held, that plaintiff did not have an adequate remedy at law by an action of replevin, and hence equity was entitled to assume jurisdiction. *Missouri Broom Co. v. Gymon*, 115 Fed. 112.

³ *Peterson v. R. Co.*, 38 Minn. 511; *Clough v. R. Co.*, L. R. 7 Ex. 35; *Gillespie v. Moon*, 2 Johns. Ch. 585, 7 Am. Dec. 559; *Pence v. Langdon*, 99 U. S. 578; *Brown v. Norman*, 65 Mass. 367, 7 Am. St. Rep. 663; *Baker v. Lever*, 67 N. Y. 304, 23 Am. Rep. 117; *Bostwick v. Ins. Co.*, 92 N. W. 246 (Wis.).

⁴ *Udell v. Atherton*, 4 L. T. (N. S.) 797; *Thurston v. Blanchard*, 22 Pick. 18, 33 Am. Dec. 700; *Snow v. Alley*, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119.

⁵ *Babcock v. Lawson*, 4 Q. B. D. 394; *Scheuer v. Goetter*, 102 Ala. 313, 14 South. 774; *Moore v. Moore*, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170; *Hoffman v. Noble*, 6 Metc. 68, 39 Am. Dec. 711.

⁶ *Prest v. Farmington*, 104 Atl. 521 (Me.); *Long v. Athol*, 196 Mass. 503, 82 N. E. 665.

⁷ *Sell v. Miss. River Co.*, 88 Wis. 581, 60 N. W. 1065.

statu quo before the agreement may be rescinded; that if the plaintiff cannot return or does not offer to return the consideration received he cannot have the contract set aside and this is the doctrine of the common law courts;¹ and hence a purchaser cannot generally have the contract rescinded where he has consumed the goods either in whole or in part.²

But many of the modern cases are to the effect that equity will rescind an agreement obtained by fraud without requiring an absolute return before suit wherever such a return would operate to enhance the completeness of the fraud or abandon the little indemnity that already exists.³

“It is true, as a general proposition of law, that one, who is induced by fraud to enter into a contract with another, must, within a reasonable time after discovering the fraud, notify the other party of its rescission, and restore to him whatever consideration he has received under it. But he is not bound to restore to the other party what he has received under it, where the other party is indebted to him in a larger amount.”⁴

§ 257. *Recapture.*

Without the aid of the law, a person defrauded of his property may take possession of it by recapture, if he is able

¹ 9 Cyc. 437. *Ettlinger v. Nat. Surety Co.*, 221 N. Y. 467, 117 N. E. 945.

² *Udell v. Atherton*, 7 H. & N. 172, 4 L. T. Rep. N. S. 797; *Clark v. Dickson*, E. B. & E. 148. But one is not required to return a thing utterly worthless (*Bassett v. Brown*, 105 Mass. 551), as for example a forged note. *Haase v. Mitchell*, 58 Ind. 213. So where the property is diminished in value by reason of the use, or has been necessarily destroyed or diminished in discovering the fraud, it need not be returned. *Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. 329, 28 Am. St. Rep. 91; *Baker v. Lever*, 67 N. Y. 304, 23 Am. Rep. 117; *Campbell Printing Press, etc., Co. v. Marsh*, 20 Colo. 22, 36 Pac. 799.

³ *O'Brien v. R. Co.*, 89 Iowa 644, 57 N. W. 425; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593; *Allerton v. Allerton*, 50 N. Y. 670.

⁴ *Girard v. St. Louis Car Wheel Co.*, 46 Mo. (App.) 105.

to do so without committing a trespass or doing unnecessary violence or committing a breach of the peace.¹

D.

DURESS.

§ 258. *Duress Defined.*

Duress is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind of a person of ordinary firmness.¹

An agreement made under duress is voidable;² and the limitations to the right to rescind for fraud,³ apply to agreements voidable for duress.

Duress, according to the older decisions, is of two kinds, viz.: (1) Duress by imprisonment, and (2) duress *per minas*.⁴

§ 259. *Duress of Imprisonment.*

Duress of imprisonment arises where a person is actually

¹ Hodgdon v. Hubbard, 18 Vt. 504, 46 Am. Dec. 117. See note to Van Wren v. Flynn, 21 Cent. L. J. 49; Barnes v. Martin, 15 Wis. 240, 82 Am. Dec. 673, note.

² Brown v. Pierce, 7 Wall. 205; Blair v. Coffman, 2 Overt. 176, 5 Am. Dec. 659; Batavian Bank v. North, 114 Wis. 637, 90 N. W. Rep. 1016.

³ Stoffer v. Latshaw, 2 Watts, 167, 27 Am. Dec. 297; Fisher v. Shattuck, 17 Pick. 252.

⁴ See ante, § 255. Thus the right to avoid the agreement may be lost by voluntarily acting upon it after the party is free from the duress. Ormes v. Beadel, 2 De G., F. & J. 333; Ferrari v. Board of Health, 24 Fla. 490, 5 South. 1; Bartle v. Breniger, 37 Iowa 139; Sornborger v. Sanford, 34 Neb. 498, 52 N. W. 368. And the rights of third parties may be superior. Deputy v. Stapleford, 19 Cal. 302; Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446.

⁵ Brown v. Pierce, 7 Wall. 205. A threat of a lawful arrest for an offense that has actually been committed is not duress. Smith v. Commercial Bank, 81 South 154 (Fla.).

imprisoned for an improper purpose without just cause,¹ for a just cause without lawful authority,² and for a just cause and under proper authority but for an improper purpose.³ Therefore it is only where the imprisonment is with lawful authority, for a just cause, and for a proper purpose, that it can not be called duress.⁴ Imprisonment is the restraint of one's liberty, whether in prison or elsewhere, for "every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of a common prison."⁵

§ 260. *Duress Per Minas—At Common Law.*

Duress *per minas* arises when a person is threatened with loss of life, or with loss of limb, or with mayhem, or with imprisonment.¹

But a mere threat of imprisonment is not legal duress; there must be a reasonable ground for apprehension that the threats will be carried into execution, and it must also appear that the threats operated upon the mind of the party so as

¹ Sharon v. Gager, 46 Conn. 189; Schommer v. Farwell, 56 Ill. 542; Taylor v. Jaques, 106 Mass. 291; Foley v. Greene, 14 R. I. 618, 51 Am. Rep. 419; Pierce v. Brown, 7 Wall. 205. Price v. Turner, 30 Pa. Dist. 25.

² Coffelt v. Wise, 62 Ind. 451; Thompson v. Lockwood, 15 Johns. 256; Brown v. Pierce, 7 Wall. 205.

³ Hatter v. Greenlee, 1 Port. 222, 26 Am. Dec. 370; Guilleaume v. Rowe, 94 N. Y. 268, 46 Am. Rep. 141; Phelps v. Zuschlag, 34 Tex. 271.

⁴ Baker v. Morton, 12 Wall. 150; Brown v. Pierce, 7 Wall. 215; Phelps v. Zuschlag, 34 Tex. 371; Holmes v. Hill, 19 Mo. 159. Thus it is an abuse of criminal process to resort to it for the purpose of coercing the payment of a private debt or demand. Bane v. Detrick, 52 Ill. 19; Shenk v. Phelps, 6 Ill. App. 612; Osborn v. Robbins, 36 N. Y. 365.

⁵ Leake, Contr. 351.

¹ U. S. v. Huckabee, 16 Wall. 414; Bush v. Brown, 49 Ind. 573, 19 Am. Rep. 695.

to overcome his will.² Therefore a threat to prosecute at some indefinite time in the future is not duress.³

A promise is not voidable for duress which is made in consideration of the release of goods from detention. Duress of or menace to the person, it is said, is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy; a man, therefore, is not bound by the agreement which he enters into under such circumstances; but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert.⁴ This distinction is well settled in the common law.

“This seeming anomaly in our law, where on the same facts money paid can be recovered, while one who has made a contract has no defense thereto and must perform the same, is a striking illustration not only of the difference between legal and equitable principles, but also of the importance of keeping the distinction between law and equity clearly in mind. The decision that in a court of law a defendant who contracted for a consideration to pay money to prevent the wrongful taking or detention of his goods had no defense to the contract, was perfectly sound, for the reason that such acts did not constitute duress at law, and a common law court had no jurisdiction over a mere equity existing in favor of the defendant. Nor was this decision inconsistent with the ruling that money paid in the same circumstances could be recovered in the count for money had and received. In the count for money had and received the court dealt confessedly with equitable principles, and the simple question was whether the circumstances were such that equitably the defendant

² *Harmon v. Harmon*, 61 Me. 227, 14 Am. Rep. 556; *Flanigan v. Minneapolis*, 36 Minn. 406, 31 N. W. 359; *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679.

³ *Horton v. Bloedorn*, 37 Neb. 666, 56 N. W. Rep. 321.

⁴ *Skeate v. Benle*, 11 Ad. & Ell. 390; *Re Meyer*, 106 Fed. 826; *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502; *U. S. v. Huckabee*, 16 Wall. 414; *Brown v. Pierce*, 7 Wall. 205. As to money paid for the release of goods, see ante, § 52

should restore to the plaintiff that which he had received. When, however, a plaintiff sought to recover on a contract, the sole question before the court was whether the facts pleaded by the defendant constituted duress at law.”⁵

In accordance with the idea of the common law court that duress must amount to a constraint which is imminent and without immediate means of prevention, and such as would operate on a person of constancy of mind and firmness of purpose,⁶ mere advice, direction, influence or persuasion was not legal duress.⁷ Nor was a threat to withhold payment of a debt, or to refuse performance of a contract, or to do an injury which may be at once redressed by legal process.⁸

§ 261. *Same—The Modern Rule.*

After some attempt to modify the old rule that legal duress existed only where there was such a threat of danger to the object of it as was sufficient to deprive a constant and courageous man of his free will, so as to make the standard that of a man of ordinary firmness,¹ the modern cases recognize no legal standard of resistance but make the test simply this: did the oppression deprive the party of the exercise of his free will,² and they “Consider the quality of the contracting mind, and therefore hold the apparent, yet unreal, consent of a subject or timid person, or person of inferior intellect,

⁵ Keener, *Quasi Contr.*, 426.

⁶ *Miller v. Miller*, 68 Pa. St. 486; *Wallach v. Hoexter*, 17 Abb. N. C. 26; *French v. Shoemaker*, 14 Wall. 332.

⁷ *Barrett v. French*, 1 Conn. 354, 6 Am. Dec. 241; *Batavia Bk. v. North*, 114 Wis. 637, 90 N. W. 1016.

⁸ *Miller v. Miller*, 68 Pa. St. 486; *McCormack v. Dalton*, 53 Kas. 146, 35 Pac. 1131; *Doyle v. Trinity Church*, 133 N. Y. 372, 31 N. E. 221; *Goebel v. Linn*, 47 Mich. 489, 11 N. W. Rep. 284, 41 Am. Rep. 723.

¹ See the cases collected by me in 9 Cyc. 445-450.

² *Brown v. Pierce*, 7 Wall. 205; *Love v. State*, 78 Ga. 66, 3 S. E. Rep., 6 Am. St. Rep. 234; *Galusha v. Sherman*, 105 Wis. 263, 81 N. W. 494; *Radick v. Hutchins*, 95 U. S. 210.

as invalid as that of the strongest and most independent understanding, though the latter would not have been enthralled when the former was.”³

“Whenever from natural weakness of intellect, or from fear, whether reasonably entertained or not, either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case.”⁴

Under this doctrine threats of a mere battery⁵ or of injury to or withholding of property⁶ may amount to duress. And so wherever the parties are not at arm's length, but one of them is in a position to dictate, the courts will treat agreements which are influenced by threats of injury to or withholding of property as made under duress.⁷

But a threat to do what a person has a legal right to do is not duress; as for example, a separation deed which the wife is induced to sign by threats of the husband to alienate his property.⁸

§ 262. *Who Must Impose Duress.*

The duress must be inflicted or threatened by the other party to the contract, or else by one acting with his knowledge and for his advantage, for duress by a third person will not

³ Bishop Contr., § 719.

⁴ Scott v. Sebright, 12 P. D. 24.

⁵ Brown v. Pierce, 7 Wall. 205.

⁶ Fuller v. Roberts, 35 Fla. 110, 17 South. Rep. 359; Spaid v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Lonegan v. Buford, 148 U. S. 581.

⁷ See cases cited in 9 Cyc. 451-452.

⁸ Hughes v. Leonard, 181 Pac. 200 (Colo.).

avoid a contract made with a party who was not cognizant of it.¹

§ 263. *Must Affect Promisor.*

A contract entered into in order to relieve a third person from duress is not voidable on that ground.¹ The subject of the duress must be the contracting party himself,² or his wife, or her husband, parent, child,³ or near relative.⁴

E.

UNDUE INFLUENCE.

§ 264. *What is "Undue Influence."*

"Undue influence consists of acts which, though not fraudulent, amount to an abuse of the power which circumstances have given to the will of one individual over that of another."¹ Fraud and Undue Influence are nearly allied, the latter being an extension made by equity of the former word

¹ *Compton v. Bunker Hill Bk.*, 96 Ill. 301, 36 Am. Rep. 147; *Fightmaster v. Levi*, 17 S. W. Rep. 195; *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446; *Dimmitt v. Robbins*, 74 Tex. 441, 12 S. W. Rep. 94, and see note to *Smith v. Commercial Bank*, 81 South. 154 in 4 A. L. R. 864.

¹ *Plummer v. People*, 16 Ill. 358, 402; *Solinger v. Earle*, 82 N. Y. 393.

² Where a husband threatened that unless his wife signed his note as surety he would poison himself; this was held not duress. *Wright v. Remington*, 41 N. J. (L.) 48, 32 Am. Rep. 180.

³ *Solinger v. Earle*, 82 N. Y. 393; *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188; *Foley v. Greene*, 14 R. I. 618, 51 Am. Rep. 419; *Kocourek v. Marak*, 54 Tex. 201, 38 Am. Rep. 623; *McCoy v. Green*, 83 Mo. 676; *Rostad v. Thorsen*, 163 Pac. 423 (Ore.).

⁴ In *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946, threats made to a brother, and by him at plaintiff's request communicated to his sister in order to secure her signature to a note to compound the felony were held to constitute duress of the sister, for which she might avoid the note. *Davis v. Luster*, 64 Mo. 43.

¹ *Holland Jurisprudence*, 239.

as descriptive of an act of bad faith or deceit. Courts of equity looking beyond definite false and fraudulent statements, have inferred from a long course of conduct, from the peculiar relations of the parties, or from the circumstances of one of them, that an unfair advantage has been taken of the promisor, and that his promise ought not in justice to bind him. The taking of such an unfair advantage is sometimes called *Fraud*; but it is more convenient, for the purpose of distinguishing it from the kind of *Fraud* with which we have already dealt, to call it the exercise of "Undue Influence."

Equity will not interfere because by argument, solicitation or persuasion one person has obtained the consent of another to an agreement²—it must appear that he has dominated the other's will to such an extent as to destroy free agency or to constrain him to do against his will what he is unable to refuse.³

An agreement may be avoided on the ground of undue influence when one of the parties has induced the other to enter into it by the unconscientious use of power afforded by:

- (a) The family, fiduciary or confidential relations subsisting between them.
- (b) The mental weakness of the other, or
- (c) The necessities of the other.

In these three cases the position of the parties raises a presumption of undue influence and the transaction will not be allowed to stand, unless the person claiming the benefit of it is able (and the burden is on him to do so) to repel the presumption by showing that it was in point of fact fair, just and reasonable.⁴ This reverses the position of parties generally, for where fiduciary relations or mental weakness or other undue

² *Schofield v. Walker*, 58 Mich. 96, 24 N. W. Rep. 624; *Latham v. Udell*, 38 Mich. 238; *Bowdoin College v. Merritt*, 75 Fed. 480.

³ Cases, post.

⁴ *Smith v. Kay*, 7 H. L. Cas. 750; *Woodbury v. Woodbury*, 141 Mass. 329; *Ward v. Armstrong*, 84 Ill. 151; *Jones v. Lloyd*, 117 Ill. 597; *Fisher v. Bishop*, 108 N. Y. 25; *Pruitt v. Gause* (Iowa), 188 N. W. 798.

influence is not shown, the burden of proving fraud is on the plaintiff who seeks to rescind a contract on that ground.⁵

(a) Family or Confidential Relations.

§ 265. *Introductory.*

The family or fiduciary or confidential relations which, existing between contracting parties, give rise to a presumption of undue influence are those of husband and wife, parent and child, guardian and ward, trustee and *cestui que trust*, attorney and client, priest and member of his flock, physician and patient and any other persons standing in similar relations.

§ 266. *Husband and Wife.*

Husband and wife occupy towards each other a fiduciary relation of the most confidential character, which requires the utmost good faith between them, and a gift or conveyance from the wife to the husband is regarded with suspicion and to be supported must be free from any fraud or undue influence.¹

§ 267. *Parent and Child.*

Gifts and conveyances from a child to a parent are not favored.¹ While an adult child may make a binding transfer or conveyance of property to the parent, such a transfer by way of gift or an improvident contract made just after attaining majority, or while under parental control and influ-

⁵ Cooper v. Reilly, 63 N. W. 885.

¹ 9 Cyc. 456; 13 C. J. 406.

¹ Taylor v. Taylor, 8 How. 183; Miskey's Appeal, 107 Pa. St. 611; McKinney v. Hensley, 74 Mo. 326.

ence, will be jealously watched by courts of equity.² The same doctrine holds true of a transfer or conveyance to an adult child tainted with undue influence over an aged or infirm parent.³ Whether child or parent be the weaker party, the transaction must, in order to stand, be free from fraud or undue influence on both sides, and made in good faith; or equity will readily set it aside.⁴

§ 268. *Other Family Relationships.*

While the relationship of husband and wife and parent and child are the two most important in this connection, yet the doctrine we are considering is not limited to these but extends to any case in which one member of a family exercises a preponderating influence in the family counsels, either from age, from character, or from other circumstances.¹ In *Archer v. Hudson*,² a young lady who had just attained her majority became security for her uncle to enable him to overdraw his account at his banker's. She was an orphan, and had resided with her uncle for seven years previous to the transaction. The court adverted to the fact that the security was obtained through the influence of a person standing *in loco parentis*, from the object of his protection and care, saying that it was a transaction which under ordinary circumstances would not be allowed.

² *Berger v. Udall*, 31 Barb. 9; *Summers v. Coleman*, 80 Mo. 488; *Noble v. Moses*, 81 Ala. 530, 60 Am. Rep. 175.

³ *Highberger v. Stiffler*, 21 Md. 338, 83 Am. Dec. 593; *Baur v. Baur*, 33 Atl. 143 (Md.).

⁴ *Taylor v. Staples*, 8 R. I. 170; *Rider v. Kelso*, 53 Iowa 367; *Miller v. Simonds*, 72 Mo. 669; *Leedom v. Palmer* (Pa.), 117a, 410.

¹ *Archer v. Hudson*, 7 Beav. 551; *Brown v. Burbank*, 64 Cal. 99; *Gillespie v. Holland*, 40 Ark. 28, 48 Am. Rep. 1. See cases cited in 9 Cyc. 456.

² *Supra*.

§ 269. *Guardian and Ward.*

The same rule applies to transactions between guardian and ward.¹ While during the existence of the guardianship the relative situation of the parties imposes a general inability to deal with each other,² yet courts of equity proceed further. They will not permit transactions between guardians and wards to stand even when they have occurred after the minority has ceased, and the relation is thereby actually ended, if the intermediate period be short,³ and the circumstances do not demonstrate the fullest deliberation on the part of the ward and abundant good faith on the part of the guardian.⁴

A more stringent rule has been laid down as to guardians than applies to transactions between parent and child; for a guardian is not supposed to be influenced by that affection for his ward which parents entertain toward their own offspring and therefore has no such powerful check upon his selfish feelings.⁵

§ 270. *Trustee and Cestui Que Trust.*

A trustee will not be permitted to contract with or purchase the trust estate from his *cestui que trust*,¹ unless it clearly appear that there has been no concealment in the

¹ Ashton v. Thompson, 32 Minn. 25; Garvin v. Williams, 44 Mo. 465, 50 Mo. 206; McKonkey v. Cockey, 27 Cent. L. J. 476 and note.

² Snell's Equity, 402.

³ Waller v. Armisted, 2 Leigh. 11, 21 Am. Dec. 594; Wright v. Arnold, 14 B. Mon. 638, 61 Am. Dec. 172.

⁴ Hatch v. Hatch, 9 Ves. 267; Smith v. Dibrell, 31 Tex. 239, 98 Am. Dec. 526; Mann v. McDonald, 10 Hump. 275; Hendee v. Cleveland, 54 Vt. 142; Wade v. Pulsifier, 54 Vt. 142.

⁵ Schouler on Dom. Rel., § 387; Pierce v. Waring, 1 Ves. 380; Hylton v. Hylton, 2 Ves. 547.

¹ Fox v. Macreth, 1 Lead. Cas. 123; Jamison v. Glascock, 29 Mo. 191.

matter, and that no advantage in any way has been taken by the trustee,² and all presumptions are against its validity.³

§ 271. *Attorney and Client.*

While the relation of attorney and client continues, or even after it has been dissolved,¹ purchases made by the attorney of the client are regarded with suspicion, and the attorney, if there are any circumstances of fraud, concealment or suspicion disclosed, will be held a trustee for the client of the property so purchased.²

§ 272. *Priest and Member of Flock.*

The power which a spiritual adviser may acquire over persons subject to his influence is also looked upon as raising the presumption of *mala fides*;¹ so the burden rests upon one claiming to be a spiritualistic medium to show that a contract made by him with one having implicit belief in the existence of the powers claimed by such medium was free from undue influence.²

² *McCants v. Bee*, 1 *McCord Ch.* 383, 16 *Am. Dec.* 610; *Buell v. Buckingham*, 16 *Iowa*, 284, 85 *Am. Dec.* 516; *Smith v. Townshend*, 27 *Md.* 368, 92 *Am. Dec.* 637.

³ *Lathrop v. Pollard*, 6 *Col.* 424; *Beckett v. Tyler*, 3 *McAr.* 319; *Spencer's Appeal*, 8 *Pa. St.* 317.

¹ But not before it has begun. *Dockery v. McLellan*, 67 *N. E. Rep.* 733.

² *St. Legar's Appeal*, 34 *Conn.* 434, 91 *Am. Dec.* 735; *McGinn v. Tobey*, 62 *Mich.* 252, 28 *N. W.* 818; *Warner v. Flack*, 278 *Ill.* 303, 116 *N. E.* 197.

¹ *Hugenin v. Baseley*, 14 *Ves. Jr.* 273; *Marx v. McGlynn*, 88 *N. Y.* 357; *Ford v. Hennessey*, 70 *Mo.* 580; *Caspari v. First German Church*, 12 *Mo. App.* 293; *Rose v. Conway*, 92 *Cal.* 632, 28 *Pac.* 785.

² *Connor v. Stanley*, 72 *Cal.* 556, 1 *Am. St. Rep.* 84; *Thompson v. Hanks*, 14 *Fed. Rep.* 902.

§ 273. *Physician and Patient.*

It has been repeatedly declared that the relation of physician and patient is sufficient to avoid contracts made between them unless it is plain that the presumption of bad faith is repelled by the evidence.¹

§ 274. *Other Cases.*

This principle applies to every case where influence is acquired and abused or where confidence is reposed and betrayed.¹ It has been applied to agreements made between persons engaged to marry,² between teacher and pupil,³ and to a conveyance made by a man to his mistress.⁴ In *Smith v. Kay*,⁵ the defendant who was barely of age had incurred liabilities by the contrivance of an older man who had acquired a strong influence over him, and who professed to assist him in a career of extravagance and dissipation. It was held that influence of this nature, though it could not be called parental, spiritual, or fiduciary, entitled him to the protection of the court.

But the mere fact that the parties were *friends* is not enough. Thus in a Connecticut case it is said:

“Although friends in fact, in law and equity they were strangers, and stood at arms length in the matter of contract,

¹ *Dent v. Bennett*, 4 My. & Cr. 269; *Cadwallader v. West*, 48 Mo. 483; *Audenreid's Appeal*, 89 Pa. St. 114, 33 Am. Rep. 731; *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. Rep. 275, 55 Am. Rep. 479.

² *Smith v. Kay*, 7 H. L. Cas. 750; *Morley v. Loughman*, 1 Ch. 736 (1893); *Hall v. Perkins*, 3 Wend. 626.

³ *Rockafellow v. Newcomb*, 57 Ill. 186; *Lamb v. Lamb*, 130 Ind. 273, 30 N. E. Rep. 36; *Russell's Appeal*, 75 Pa. St. 269.

⁴ *Courtney v. Blackwell*, 150 Mo. 245, 51 S. W. 668

⁵ *Leighton v. Orr*, 44 Iowa 679; *Hanna v. Wilcox*, 53 Iowa 547, 5 N. W. 717; *Shipman v. Furniss*, 69 Ala. 555, 44 Am. Rep. 528.

⁶ 7 H. L. Cas., 750.

for friendship is unknown to law or equity; in it neither finds any relation involving special confidence.”⁶

§ 275. *How Long Disability Continues.*

Where a relation of confidence is once established it will not be considered as at an end while the influence derived from it can be reasonably supposed to remain. Thus, the influence of a parent or guardian or one *in loco parentis* is presumed to continue for some time after termination of the minority or dependence and until there is what may be called a complete emancipation, so that a judgment may be formed independent of any sort of control.¹ And this principle applies to every other relation of confidence.²

(b) Mental Weakness.

§ 276. *Rule in this Case.*

In a case at law, as we have seen, mere weakness of mind or illness or monomania or intoxication or habits of drunkenness is no ground of defense to an action of contract, the defedant must have been so insane as not to understand the nature and effect of the agreement.¹ And in equity a difference in the mental capacity of the parties to a contract is no ground for rescission, unless one overreach the other through

⁶ Hemingway v. Coleman, 49 Conn. 392. And see Fish v. Cleland, 33 Ill. 238, 43 Ill. 282; Wilson v. Wilson (S. C.), 112 S. E. 330.

¹ Archer v. Hudson, 7 Beav. 551; Garvin v. Williams, 44 Mo. 465, 50 Mo. 206; Miller v. Simonds, 72 Mo. 669; Ashton v. Thompson, 32 Minn. 25.

² Mason v. Ring, 3 Abb. App. Dec. 210; Rhodes v. Bate, L. R. 1 Ch. 253, 260; Mitchell v. Homfray, 8 Q. B. D. 587; Henry v. Raiman, 25 Pa. St. 354.

¹ Ante, § 160.

his superior capacity.² In equity, however where the mind is affected by old age, illness, intoxication or the like, whereby it is rendered incapable of resisting undue pressure, a contract made under such circumstances is made under undue influence, and the other party will be called upon to show the fairness of the agreement.³

While mere inability to read does not disable one to contract,⁴ yet one dealing with a person who cannot read or write is often called upon to show that the latter fully understood the meaning and effect of the writings upon which he is sought to be charged.⁵

(c) Necessity.

§ 277. *Introductory.*

In the cases which fall under this division, as well as those under the last, (b), the element of personal influence is not present, but they all possess these common features: the promisor incumbers himself with heavy liabilities for the sake of a small, or an inadequate present gain; and the promisee takes advantage either of the improvidence or physical and moral weakness, or else of the ignorance and unprotected situation, of the promisor.¹

§ 278. *Expectant Heirs.*

An expectant heir, in real or imaginary need of money and exposed to the temptation of raising it on his expectancy, is at such a disadvantage as to be peculiarly liable to imposi-

² Moore v. Cross, 87 Tex. 557, 29 S. W. 1051; Willemin v. Dunn, 93 Ill. 511; Kimball v. Cuddy, 117 Ill. 213; Hamilton v. Armstrong, 120 Mo. 597, 25 S. W. 545.

³ 9 Cyc. 459; 13 C. J. 408; Wilson v. Wilson (S. C.), 109 S. E. 278.

⁴ Willard v. Pinard, 65 Vt. 160, 26 Atl. Rep. 67.

⁵ Cooke v. Lamotte, 15 Beav. 234; Selden v. Meyers, 20 How. 506; Jones v. Austin, 17 Ark. 498.

¹ Anson Contr., 168.

tion, and to require an extraordinary degree of protection.¹ Therefore if a man takes advantage of the present poverty of an expectant heir to extort from him an exorbitant and ruinous rate of interest, he is liable to have the bargain set aside, and to be remitted to his claim for so much money as he has actually advanced, with the current rate of interest upon it.²

§ 279. *Reversionary Interests.*

The English court of chancery early adopted the rule that the purchaser of any reversionary interest might always be called upon to show that he had given full value for his bargain, so that he might not take advantage of a man's present necessities to deprive him of his future estate without reasonable return.¹ This rule, so far as it relates to vested interests, has been denied to be in force in the United States.² In Virginia it is held that mere inadequacy of consideration, unless it be so great as to shock the moral sense, is insufficient to avoid the sale of a reversionary interest.³ In *Parmelee v. Cameron*,⁴ the Court of Appeals of New York, ruled that equity will not, in the absence of fraud or undue influence, interfere to set aside a sale by a legatee of a legacy of a fixed and certain sum of money, payable at a fixed period after the death of the testator, with interest although such sale was made some years before the legacy was due, and for an inadequate consideration, and although the legatee was at

¹ Aylesford v. Morris, L. R. 8 Ch. 484; Jenkins v. Pye, 12 Pet. 257; Mastin v. Marlow, 65 N. C. 695.

² 1 Story Eq. 339; Jenkins v. Pye, 12 Pet. 241; Butler v. Duncan, 47 Mich. 94, 41 Am. Rep. 713.

³ Anson Contr., 169; Chesterfield v. Jannsen, 1 Atl. 293; Benyon v. Cook, L. R. 10 Ch. 389; Miller v. Cook, L. R. 10 Eq. Cas. 641.

⁴ See Cribbins v. Markwood, 13 Gratt. 495, 499; Mayo v. Carrington, 19 Gratt. 74; Parmelee v. Cameron, 41 N. Y. 392.

⁵ Mayo v. Carrington, supra, and see Baker v. Bonham, 33 N. J. Eq. 617; Bunch v. Hurst, 3 Dessau, 273, 5 Am. Dec. 551.

⁶ 41 N. Y. 392.

the time of the sale, a "reckless, dissipated, improvident and weak-minded young man," such a sale not being within the equity rule which enables the court to relieve expectant heirs, remaindermen and reversioners from disadvantageous bargains, where both the amount or value of the interest sold and the time of its enjoyment are uncertain.

§ 280. *Lender and Borrower.*

Agreements between lender and borrower are scrutinized by courts of equity, which refuse to enforce them, where to do so would be both unjust and unconscionable.¹ Thus relief was given in respect of a loan secured by mortgage and bearing interest at the rate of 5 per cent per month in advance, the court finding, however, that the relation of the parties was such that the lender had upon him the duty of protecting the borrower.² No stipulation in a mortgage can affect the right of the mortgagor to redeem; and a release by the mortgagor after execution of the mortgage, of his equity or his interest in the mortgaged premises will be viewed with suspicion by the court.³ And on the sale by a mortgagor of his equity of redemption to the mortgagee, if the mortgagee take any undue advantage of the mortgagor, equity will compel him to redeed the property on receiving his debt and interest.⁴

¹ *Dorrill v. Eaton*, 35 Mich. 302; *Butler v. Duncan*, 47 Mich. 94, 10 N. W. 123, 41 Am. Rep. 711; *Hough v. Hunt*, 2 Ohio 495, 15 Am. Dec. 567.

² *Brown v. Hall*, 14 R. I. 249, 51 Am. Rep. 375.

³ See 51 Cent. L. J., p. 401.

⁴ *Bigelow on Fraud*, 259.

There are a few cases where a court of law has refused to enforce an agreement because one party was in a position to exact from the other a greater consideration than what the service was worth. See *Floyer v. Edward*, Cowp. 112; *Jestins v. Brooke*, Cowp. 793; *Cutler v. Howe*, 8 Mass. 266; *Baxter v. Wales*, 12 Mass. 365; *Green v. Tweed*, 13 Abb. Pr. N. S. 427. Some of these decisions may be reconciled on the ground that the plaintiff was endeavoring to impose a penalty. See post, § 486. But in a Kansas case where plaintiff had sold and transferred to the defendant a policy of insurance of \$1,477.73,

(d) Consideration.

§ 281. *Inadequacy of Consideration.*

We have seen¹ that courts of law, while requiring some consideration to support a contract, will not inquire into its adequacy. And it is well established that mere inadequacy of price is in itself of no more weight in equity than at law² that while it may be evidence of fraud, yet standing alone, it is not conclusive evidence.³ But while mere inadequacy of consideration is insufficient evidence of fraud or undue influence, still where the inadequacy is so gross as to shock the conscience and common sense of all men, it may amount to proof of fraud.⁴ And where (as in the previous sections of this chapter) the party was not a free agent, the fact that the consideration was inadequate is a material element in determining the court to set the transaction aside.

(e) Remedies.

§ 282. *Limits to Right to Rescind.*

The limitations upon the right to rescind for fraud and duress¹ apply also with one difference to undue influence, the which the insurance company was willing to pay if the plaintiff would place her signature to the release on the policy, and plaintiff taking advantage of her assignee's situation, exacted his promise to pay her \$477.73 for the writing her name, it was held that the promise was not binding and that plaintiff was entitled to recover only the fair value of her services in writing her signature, which was fixed by the court at one cent. *Cuplice v. Kelley*, 23 Kan. 474, 25 Kan. 359. This decision is clearly contrary to common law principles. It is a court making a bargain for the parties which they never intended to make. See ante, § 100.

¹ Ante, § 100.

² *Wood v. Abroy*, 3 Mad. 216; *Stillwell v. Wilkins*, Jac. 280; *Eyre v. Potter*, 15 How. 42; *Hawkins v. Randolph* (Ark.), 231 S. W. 556.

³ *Cockell v. Taylor*, 15 Beav. 105; *Davidson v. Little*, 22 Pa. St. 245.

⁴ 2 *Pomeroy Eq. Juris.* 927; *Eyre v. Potter*, 15 How. 42; *Hyer v. Little*, 20 N. J. (Eq.) 443.

¹ Ante, § 255.

agreement being simply voidable and capable of ratification by the party influenced.² This distinction is that in the case of fraud, so soon as the fraud is discovered the parties are placed on equal terms, and an affirmation of the contract or laches in setting it aside binds the party who was originally defrauded. But in the case of undue influence it is not a particular statement, but a combination of circumstances which constitute the vitiating element in the contract; and unless it is clear that the will of the injured party is relieved from the *dominant influence* under which it has acted, or that the imperfect knowledge with which he entered into the contract is supplemented by the fullest assistance and information, affirmation or laches will not be allowed to bind him.³

² *Dent v. Long*, 90 Ala. 172, 7 South. 640; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. Rep. 622; *Dayton City Nat. Bank v. Kusworm*, 91 Wis. 166, 64 N. W. Rep. 843; *O'Callahan v. Lowndes*, 66 Fed. 356; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

³ *Moxon v. Payne*, 8 Ch. 881; *Savery v. King*, H. L. Cas. 664; *Montgomery v. Perkins*, 116 Mass. 227; *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359; *Rau v. Von Zedlitz*, 132 Mass. 164. The presumption of undue influence does not cease because the child or the ward has become of age, or other confidential relations have come to an end. *Archer v. Hudson*, 7 Beav. 761; *Mason v. Ring*, 3 Abb. Dec. 210, 2 Abb. Pr. N. S. 322; *Henry v. Raiman*, 25 Pa. St. 354, 64 Am. Dec. 703.

CHAPTER VII.

THE LEGALITY OF THE AGREEMENT.

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§ 283. *Introductory.*

The law imposes certain limitations upon freedom of contract by forbidding and refusing to enforce certain kinds of agreements. Courts enforce contracts, not for the benefit of the parties but because the law regards their performance in general essential to the welfare of the community, and therefore wherever it appears that it would be contrary to the public welfare to enforce particular classes of

agreements the courts refuse to do so.¹ The illegality may be found either in the consideration or in the promise or in the purpose for which the agreement is made.

The agreements which the law thus discourages and forbids are of three kinds, viz.: (a) those made in breach of a statute, (b) those made in breach of some rule of the common law; (c) those contrary to public policy. These three divisions will be treated in this chapter, and will be followed by a consideration of (d) the effect of such illegality.

(a)

AGREEMENTS IN BREACH OF STATUTES.

§ 284. *Statutory Prohibition of Act.*

When a statute expressly prohibits an act, an agreement to perform or whose object is to further the doing of the prohibited act is illegal and void.¹ The same rule obtains when the agreement is in violation of a statute although not therein expressly declared to be void.² And when a statute prohibits the making of agreements except in a certain manner, an agreement made in a different manner is *ipso facto* void.³

§ 285. *Statutes Merely Imposing Penalty.*

Sometimes a statute does not prohibit an act but simply

¹ Harriman, Contr. § 171.

² 9 Cyc. 475; 13 C. J. 420; Union Nat. Bk. v. R. Co., 145 Ill. 208, 34 N. E. 139; Cattle Co. v. County (Tex. Civ. A.) 235 S. W. 295. So a contract in violation of the constitution of the United States, whether made by the United States, a State or an individual, is invalid. Patton v. Gilmer, 42 Ala. 548, 94 Am. Dec. 665; Richmond v. Conservative Ins. Co., 166 Wis. 334, 165 N. W. 286.

³ Fowler v. Scully, 72 Pa. St. 456, 13 Am. Rep. 699; Storz v. Finklestein, 46 Neb. 377, 65 N. W. 195; Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 55 Am. St. Rep. 63.

³ Aetna Ins. Co. v. Harvey, 11 Wis. 394.

imposes a penalty for so doing—instead of saying “no one shall catch fish in nets” it says “whoever shall catch a fish in a net shall be fined, etc.” The weight of authority seems to be that where a statute pronounces a penalty for an act, an agreement founded on such act is void, although the statute does not in express words prohibit it¹ in accordance with the opinion of Lord Holt, in an old case, that

“Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibiting words in the statute.”²

Some courts hold that when the penalty is imposed simply for the protection of the revenue, as where the use of documents or the sale of goods not stamped is penalized, the agreement is not illegal,³ for the legislature in passing such a law

only desired to make it expensive to the parties in proportion as it is unprofitable to the revenue.”⁴ Other courts criticising this distinction as unsatisfactory regard the question as one of legislative intent, and that the statute must be examined as a whole to find out whether or not the makers of it meant that an agreement in contravention of it should be void or not.⁵

¹ 9 Cyc. 476; 13 C. J. 421.

² *Bartlett v. Vinor*, Carth. 251.

³ 9 Cyc. 477; 13 C. J. 422; *Simmons v. Oatman* (Kas.) 202 P. 977.

⁴ *Anson Contr.* 185. This author suggests the continuity of the penalty as a test. “If the penalty is imposed once for all, and is not recurrent on the making of successive contracts of the kind which are thus penalized, or if other circumstances would make the avoidance of the contract a punishment disproportionate to the offense, it may be argued that such contracts are not to be held void. But where the penalty recurs upon the making of every contract of a certain sort, we may assume (apart from revenue cases, as to which there may yet be a doubt), that the contract thus penalized is avoided as between the parties.” [Citing *Cope v. Rowlands*, 2 Gale, 231, 2 M. & W. 149; *Smith v. Mawhood*, 14 M. & W. 452.]

⁵ 9 Cyc. 477; 13 C. J. 422.

Thus where a statute imposed a penalty for the failure of a dealer

In *Pangborn v. Westlake*⁶ a statute provided that any one who should sell or offer to sell any town lots until the plat of the town was recorded should pay \$50 for each lot so sold or offered for sale. The question was whether a sale of a town lot before the plat had been recorded was void; and it was held that it was not, the court saying:

“It must be apparent to every legal mind, that when a statute annexes a penalty for the doing of an act, it does not always imply such a prohibition as will render the act void. Suppose, for instance, the act itself expressly provided that the penalty annexed should not have the effect of rendering the act void. Surely in such case the courts would not give such force to the legal implication, under the general rule above quoted, as to override the express negation of it in the statute itself. Then, upon this conclusion, we are prepared for the next step, which is equally plain, that if it is manifest from the language of the statute, or from its subject-matter and the plain intent of it, that the act was not to be made void, but only to punish the person doing it with the penalty prescribed, it is equally clear that the courts would readily construe the statute in accordance with its language and its plain intent. We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and, if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly.”

in milk to have the measures used in the sale of milk sealed by the proper officer, it was held that this prohibited sales of milk in measures not sealed and the price of milk so sold could not be recovered. *Miller v. Post*, 1 Allen, 434, 435, as such a statute was plainly intended to protect the purchasers of milk; and where a statute imposes a penalty for retailing intoxicating liquors without a license such sales are thereby prohibited, because the object of the statute is to diminish the evils of intemperance and not merely to secure revenue. *Lewis v. Welch*, 14 N. H. 294; *Griffith v. Wells*, 3 Denio, 226.

⁶ 36 Ia. 546, *Contra. Downing v. Ringer*, 7 Mo. 585.

§ 286. *Illustrations of Agreements Contrary to Statutes.*

Where a statute prescribes conditions for the conduct of any profession, business or trade and those conditions are not observed, agreements made in the course of such profession, business or trade are illegal. An attorney,¹ a physician,² a school teacher,³ or other professional man being prohibited from practicing his profession without a license, one not so licensed cannot sue for his services, for the agreement to perform the services and pay for them is illegal. The same is true where the license is required for the carrying on of a particular business or trade.⁴ So where a statute requires goods to be inspected or stamped, sales made in disregard of these provisions are illegal and void.⁵ So where a statute

¹ *Hittson v. Brown*, 3 Colo. 304; *Yates v. Robertson*, 80 Va. 475; *Hall v. Bishop*, 3 Daly, 109; *Harland v. Lilenthal*, 53 N. Y. 438; *Ames v. Gilman*, 10 Metc. 239; *Brooks v. Volunteer Harbor*, 123 N. W. 511 (Mass.) allowing recovery for services rendered by a licensed attorney in another state where he had no license to practice. As to corporations practicing law see *Re Bense*, 124 N. Y. S. 726; *Buxton v. Lietz*, 139 N. Y. S. 46, and see 4 A. L. R. 1087.

² *Richardson v. Dorman*, 28 Ala. 679; *Thompson v. Hazen*, 25 Me. 104; *Orr v. Meek*, 111 Ind. 40, 11 N. E. Rep. 787; *Holmes v. Halde*, 74 Me. 28, 43 Am. Rep. 567; *McNamara v. Clintonville*, 62 Wis. 207, 51 Am. Rep. 722; *Roberts v. Levy*, 31 Pac. Rep. 570 (Cal.); *Underwood v. Scott*, 23 Pac. Rep. 942; See *Smyth v. Hanson*, 61 Mo. (App.) 286.

³ *Wells v. People*, 71 Ill. 532; *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Ryan v. School Dist. No. 13*, 27 Minn. 433, 8 N. W. Rep. 146; *Johnson v. Davidson* (Cal.), 202 P. 159.

⁴ As for example a broker, *Johnson v. Hulings*, 103 Pa. St. 498, 49 Am. Rep. 131. A wholesale or retail liquor dealer, *O'Bryan v. Fitzpatrick*, 48 Ark. 487, 3 S. W. Rep. 527; *Griffith v. Wells*, 3 Den. 226; *Miller v. Ammon*, 145 U. S. 421; a pawnbroker, *Fergusson v. Norman*, 1 Arn. 418, 5 Bing. N. Cas. 76; a printer, *Bensley v. Bignold*, 5 B. & Ald. 335; a peddler, *Stewartson v. Lothrop*, 12 Gray 52; a carpenter or builder, *Stevens v. Gourley*, 7 C. B. N. S. 99; an innkeeper, *Randell v. Tuell*, 89 Me. 443, 36 Atl. Rep. 910; a grocer, *Munsell v. Temple*, 8 Ill. 93; a plumber, *Johnson v. Dahlgren*, 52 N. Y. (Supp.) 888.

⁵ *Baker v. Binton*, 31 Fed. Rep. 401; *Prescott v. Battersby*, 119 Mass. 285; *Braunn v. Keally*, 146 Pa. St. 519, 23 Atl. Rep. 389, 28 Am. St. Rep. 811; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Niemeyer v. Wright*, 75 Va. 239, 40 Am. Rep. 720; *Conley v. Sims*, 71 Ga. 171.

enacts that if any person shall run or knowingly permit his grain to be threshed by a machine, the rods of which were not boxed, shall be guilty of a misdemeanor, one who threshed the grain of another under a contract, with a machine not so boxed, cannot recover his compensation.⁶ So where a statute provides that bricks shall be of a certain size and prohibits the making of any of a different size, a vendor of bricks of the latter size cannot recover their price;⁷ Where a statute prohibits under a penalty the keeping of a nine-pin alley appurtenant to a tavern, a carpenter who builds one in such a place cannot recover for his labor.⁸ The same principle is applied to a suit for services in the purchasing of corn in order to "bull" the market in violation of a statute making it an offense to corner the market or to make an attempt to do so⁹ and to a condition in a policy of insurance that if the insured commits suicide, the amount recoverable shall be reduced, where the statute makes suicide no defense to an action on a policy.¹⁰

Under this head, agreements contrary to the intent of the bankruptcy laws are void¹¹ and agreements contrary to the statutes against usury¹² and many others which cannot be set out in detail here.

There is one contract however which is not affected by the rule which renders agreements void which are contrary to the prohibition of a statute, viz.: a contract of marriage.¹³ Hence a marriage entered into without a license as required

⁶ *Dillon v. Allen*, 46 Ia. 299, 26 Am. Rep. 185.

⁷ *Law v. Hodgson*, 2 Camp. 117.

⁸ *Spurgeon v. McElwain*, 6 Ohio, 442, 27 Am. Dec. 266.

⁹ *Foss v. Cummings*, 36 N. E. Rep. 553 (Ill.).

¹⁰ *Keeler v. Ins. Co.*, 58 Mo. (App.) 557.

¹¹ *Re Gomersall*, L. R. 1 Ch. D. 137; *Hall v. Dyson*, 17 Q. B. 785; *Rice v. Maxwell*, 13 S. & M. 289, 53 Am. Dec. 85; *Sharp v. Teese*, 9 N. J. (L.) 352, 17 Am. Dec. 479, Ex parte Mackay, L. R. 8 Ch. 643.

¹² See *Webb on Usury*.

¹³ *Hervey v. Moseley*, 7 Gray, 479, 66 Am. Dec. 515.

by statute,¹⁴ or without the consent of parents or guardians,¹⁵ is nevertheless, valid, though the parties concerned may be punished by the infliction of the statutory penalties.¹⁶ Marriages, however, within the prohibited degrees of kindred and affinity, are void¹⁷ and an executory contract to marry would be likewise unenforceable made under similar conditions.¹⁸ Such prohibitions are not merely regulatory, but concern the form and the substance of the contract.¹⁹

There are two kinds of agreements violating statutes which should be given special attention, viz.; Wagers and Sunday contracts.

§ 287. *Wagers.*

A wager is a promise to give money or money's worth upon the determination or ascertainment of an uncertain event; the consideration for such a promise is either something given by the other party, or a promise to give upon the event determining in a particular way.¹

To constitute a wager there must be mutual chances of gain and loss and the uncertain event must be the sole condition of the agreement. Thus a bet by B of \$10 to nothing that A will not win a foot race or will not return B's lost dog, would be only an offer of a reward,² and a bet of \$10

¹⁴ *Holmes v. Holmes*, 6 La. 463, 26 Am. Dec. 482; *Askew v. Dupree*, 30 Ga. 173; *White v. State*, 4 Ia. 449; *Cartwright v. McGown*, 121, Ill. 388, 2 Am. St. Rep. 105.

¹⁵ *Hiram v. Pierce*, 45 Me. 367, 71 Am. Dec. 555; *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742.

¹⁶ *Milford v. Worcester*, 7 Mass. 48.

¹⁷ See *Lawson Rights*, Rem. & Pr. § 702, et seq.

¹⁸ *Campbell v. Crampton*, 18 Blatch, 150, 8 Abb. N. C. 363; *Paddock v. Robinson*, 63 Ill. 99, 14 Am. Rep. 112; *Haviland v. Halstead*, 34 N. Y. 643.

¹⁹ *Pollock Contr.* 250.

¹ *Anson, Contr.*, 186, *Leake Contr.* 748; *Thacker v. Hardy*, 4 Q. B. D. 695.

² See ante Chap. I. An offer of reward for the exercise of strength or speed is not a wager. *Harriman Contr.* § 204.

to nothing that it would not rain in 24 hours would be only a promise on a condition.³ Premiums or prizes offered to successful competitors in contests of speed, skill or the like, even though they pay an entrance fee, are not wagers.⁴ So a promise to pay B a certain large sum for goods if they arrive at a certain time or if C approve of them is a conditional promise; and a promise by A to pay B for the goods C bought if he does not pay for them is a guaranty and not a wager.⁵

So where A and B agreed to exchange property on terms to be fixed by C and if either refused to abide by his decision he should pay the other \$10, it was held that the agreement was not a wager but was one for liquidated damages.⁶

But if A promised B to pay him a certain sum if C approved, in consideration of B promising to pay him a certain sum if C did not approve or if A promised B to pay for the goods if C did not, in consideration of B promising to pay A a certain sum if C paid for them, these would both be wagers.

Wagering agreements when void are so because prohibited by statute, for they were not illegal by any rule of the common law.⁷

³ See post § 424.

⁴ *Hankins v. Ottinger*, 115 Cal. 454; *Porter v. Day*, 71 Wis. 296; *Wilkinson v. Stitt*, 175 Mass. 581.

⁵ *Parsons v. Taylor*, 12 Hun. 252.

⁶ *Parsons v. Taylor*, 12 Hun. 252.

⁷ *Hampden v. Walsh*, L. R. 1 Q. B. Div. 192; *Johnston v. Russell*, 37 Cal. 670; *Winchester v. Nutter*, 52 N. H. 507, 13 Am. Rep. 93. *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518; *Bailes v. Williams*, 15 Tex. 318; *Smith v. Smith*, 21 Ill. 244, 74 Am. Dec. 100; *Trenton, etc., Ins. Co. v. Johnson*, 24 N. J. L. 583; *Kirkland v. Randon*, 8 Tex. 10, 58 Am. Dec. 94; *Stoddard v. Martin*, 1 R. I. 1, 19 Am. Dec. 643; *Dunham v. Strother*, 1 Tex. 89, 46 Am. Dec. 97.

The descendants of the Puritan settlers of the New England States took a different view of the matter, and in those states and some others, all wager contracts are held to be illegal. *Amory v. Gilman*, 2 Mass. 1; *Love v. Harvey*, 114 Mass. 82; *Wheeler v. Spencer*, 15 Conn. 30; *Eldred v. Molley*, 2 Colo. 320; *Winchester v. Nutter*, 52 N. H. 507, 13 Am. Rep. 93; *Harding v. Walker*, 1 Hemp. 53; *West v.*

“It is well established by numerous authorities, which it would be here superfluous to cite, that at common law, a wager, being a contract by A to pay money to B on the happening of a given event, in consideration of B paying money to him on the event not happening, was legal, provided the subject-matter of the wager was one upon which a contract could lawfully be entered on.”⁸

Thus wagers of the following kind have been considered legal and enforceable: that a certain person was the owner of a certain piece of property;⁹ that the world is not round;¹⁰ that a railroad would or would not be finished to a certain place by a certain time;¹¹ as to the weight of a dressed hog;¹² as to the result of an election after the vote was cast but before the result was known;¹³ as to whether A was older than B;¹⁴ as to which horse would win a race;¹⁵ as to whether A had signed a certain paper.¹⁶ The reported cases where wagers were held void by the common-law courts show that the result came about not because the agreement was a wager

Holmes, 26 Vt. 530; *Wilkinson v. Tousley*, 16 Minn. 299, 10 Am. Rep. 139; *Edgell v. McLaughlin*, 6 Whart. 176; *Hoit v. Hodge*, 6 N. H. 104, 25 Am. Dec. 451; *Monroe v. Smelly*, 25 Tex. 586, 78 Am. Dec. 541; *Lucas v. Harper*, 24 Ohio St. 328; *Bernard v. Taylor*, 23 Oreg. 416; *Lynch v. Rosenthal*, 42 N. E. Rep. 1103 (Ind.).

⁸ *Hampden v. Walsh* *supra*.

⁹ *Good v. Elliott*, 3 Term Rep. 693.

¹⁰ *Hampden v. Walsh*, L. R. 1 Q. B. D. 192.

¹¹ *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518; *Beadles v. Bless*, 27 Ill. 320, 81 Am. Dec. 231.

¹² *Mulford v. Bowen*, 9 N. J. L. 315.

¹³ *Smith v. Smith*, 21 Ill. 244, 74 Am. Dec. 100.

¹⁴ *Hussey v. Crickett*, 3 Camp. 168.

¹⁵ *McAllester v. Haden*, 2 Camp. 438.

¹⁶ *Micklefield v. Hepgin*, 1 Anstr. 133.

but because its subject-matter was otherwise illegal—either because contrary to statutes,¹⁷ good morals,¹⁸ or public policy.¹⁹

But in nearly all of the States, wagers are now prohibited by statute, and by those statutes what is and what is not a wagering contract must be determined.²⁰

§ 288. *Agreements for Future Delivery of Goods.*

Agreements of this kind, known in the language of the street and exchange as “futures,” are condemned by judicial decision and legislative act as a species of gaming. An agree-

¹⁷ A bet on what play could be made in the game of hazard (because the playing of hazard was forbidden by statute). *Brown v. Leeson*, 2 H. Bl. 43. Or on a cock fight or dog fight (because both were against the law). *Squires v. Whisken*, 3 Camp. 140; *Egerton v. Finzeman*, 1 R. & M. 213.

¹⁸ A wager as to whether a certain person is a man or a woman (*DaCosta v. Jones*, 2 Camp. 729); or as to whether an unmarried woman will have a child by a certain day (*Ditchburn v. Goldsmith*, 4 Camp. 152), is void.

¹⁹ A wager that one of the parties would not marry (because contracts in restraint of marriage are against public policy). *Hartley v. Rice*, 10 East. 22. That a certain bird will win a cock fight (because it encourages cruelty). *Brogden v. Marriott*, 3 Bing. N. C. 88. As to the future amount of the hop duty (because it might expose to all the world the amount of the public revenue, and Parliament was the only proper place for the discussion of such matters). *Atherford v. Beard*, 2 Term. Rep. 610. As to the duration of the life of Napoleon Bonaparte (because it gave one party an interest in keeping the king's enemy alive, and the other an interest in compassing his death by unlawful means), *Gilbert v. Sykes*, 16 East. 150. As to whether a prisoner will be convicted on a criminal charge (because it gives one of the parties an interest in obstructing or corrupting the fountains of justice). *Evans v. Jones*, 5 Me. & W. 77. As to whether a person may lawfully be held in bail in a certain action or a wager on an abstract question of law or judicial practice (for the same reason as in last case). *Henken v. Gerris*, 2 Camp. 408. As to the result of an election (because it gives each party an interest in corrupting the vote or falsifying the count). *Bunn v. Riker*, 4 Johns. 426, 4 Am. Dec. 292. That a young lady who passes for twenty-three years of age is really thirty-three or that she squints or has a mole on her breast, *Good v. Elliott*, 3 T. R. 698. As to which public coach a certain person would go in to an entertainment. *Elthan v. Kingsman*, 1 B. & Ald. 683 (because in both these cases the effect of the bet would be to cause a disturbance of the peace).

²⁰ See 1 Stimson Stat. Law.

ment for the *bona fide* delivery of goods on a future day or when called for whether the seller has the goods at the time or not is a valid contract and enforceable,¹ but if, under guise of a contract to deliver goods at a future day, the real intent be to speculate in the rise and fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for performing the agreement, the whole transaction is a wager, and is illegal.²

“A contract for the sale and purchase of wheat, to be delivered in good faith at a future time, is one thing, and is not inconsistent with the law. But such a contract entered into without an intention of having any wheat pass from one party to the other, but with the understanding that, at the appointed time, the purchaser is merely to receive or pay the difference between the contract and the market price, is another thing, and such as the law will not sustain. This is what is called a settling of the differences, and as such is clearly and only a betting upon the price of wheat.”³

Agreements of this kind are declared illegal in many states by statutes, but where there are no such statutes they are illegal as against public policy, because:

¹ Wollcott v. Heath, 78 Ill. 433; Cole v. Milmine, 88 Ill. 349; Wall v. Schneider, 59 Wis. 352, 48 Am. Rep. 520; Bigelow v. Benedict, 70 N. Y. 202, 26 Am. Rep. 523; Strong v. Solomon, 6 Daly, 531, 71 N. Y. 426; Hatch v. Douglass, 48 Conn. 116, 40 Am. Rep. 154; Clay v. Allen, 63 Mass. 426; Cobb v. Prell, 15 Fed. Rep. 774; Kirkpatrick v. Bonsall, 72 Pa. St. 155.

² Irwin v. Williar, 110 U. S. 499; Gregory v. Wendell, 39 Mich. 337, 33 Am. Rep. 390; Samson v. Shaw, 101 Mass. 145, 3 Am. Rep. 327; Crawford v. Spencer, 92 Mo. 498, 1 Am. St. Rep. 745; McGrew v. City Produce Exchange, 85 Tenn. 572, 4 Am. St. Rep. 771; Lyon v. Culbertson, 83 Ill. 33, 25 Am. Rep. 349; Hatch v. Douglass, 48 Conn. 116, 40 Am. Rep. 154; Pearce v. Foot, 113 Ill. 228, 55 Am. Rep. 414; Bigelow v. Benedict, 70 N. Y. 202, 26 Am. Rep. 523.

³ Rumsey v. Berry, 65 Me. 574; Waldron v. Johnson, 86 Fed. Rep. 757. If one of the parties intends a bona fide sale, it may be enforced by him though the other intended a mere wager, Gregory v. Wendell, 39 Mich. 337; Williams v. Tiedeman, 6 Mo. (App.) 269; Cockrell v. Thompson, 85 Mo. 510; Hill v. Johnson, 38 Mo. (App.) 383; Mohr v. Miesen, 47 Minn. 228.

“They tend to unsettle the natural course of trade, and tempt the parties to work for a rise or fall in the prices of the commodities on which their wagers are laid, without regard to actual values, and by censurable methods calculated to promote their own profit at the expense or ruin of others, without any reciprocity of benefit; and, besides these evils, there are others, more immediate to the parties, culminating from time to time in loss of fortune and character, defalcations, crime and domestic misery.”⁴

§ 289. *Contracts of Insurance.*

There is one kind of wager that has escaped both judicial and legislative disapproval *i. e.* insurance of life and property. It is obvious that a man who bets that his horse will not win a race and a man who bets that his cargo will not arrive safely or that his property will not be burned are in the same position. A who has paid a large sum of money for a horse and for its training, has entered it for a race to the winner of which a purse of \$2,000 is to be given. To secure himself against an entire loss he bets B \$1,000 that his horse will not win. C who has a cargo of goods at sea worth \$5,000 if it is safely landed and who owns a building or land worth \$5,000 so long as it is in existence, pays an insurance company \$100 in consideration of which the company agrees to pay C \$3,000 if the cargo is lost and \$3,000 if the house is burned down within a year. This is in effect a bet by C of \$100 to \$6,000 that his cargo or house will be lost or burned within the time limited. The same is true of an agreement to pay D \$1,000 if E dies within a year in consideration of D paying \$25—it is a bet by D of \$25 to \$1,000 that E will die within a year. Yet A’s agreement is called a wager while C’s is known as a contract of marine and fire insurance and D’s as a contract of life insurance. But the last two are valid because they are neither prohibited by

⁴ *Flagg v. Gilpin*, 17 R. I. 12, 19 Atl. Rep. 1084.

statute nor against public policy.¹ If however the insurance is made between the insurer and one having no interest in the subject-matter of the agreement--if the insured would not suffer loss but gain by the destruction of the property or the death of the person whose life is insured, then the interest which the insured would have in wrecking the vessel or burning the house or killing the man, makes the agreement contrary to public policy and therefore illegal and void.²

§ 290. *Sunday Contracts.*

The common law makes no distinction between Sundays and week days in the making and the performance of agreements.¹ But in England in the reign of Charles II a statute was passed prohibiting the doing of certain things on the Lord's day and similar statutes are in force in most of our States. The phraseology of the particular statute is important for they are not at all uniform in their terms. Many of them prohibit "work or labor" on Sunday and under such statutes an agreement to do work or labor on Sunday whether entered

¹ As to what is a sufficient interest to render an insurance policy valid and enforceable, see the special works on insurance law, this subject belonging there rather to a treatise on the principles of contract. A valid life policy may be assigned to one having no interest in the life insured. *Finnie v. Walker*, 257 Fd. 698, and see note in 5 A. L. R. 837.

² But the fact that the insurer is a creditor of the insured and thus according to the authorities has such an interest in his life as to make the wagering contract valid does not always work as a sufficient test. For in New Jersey in 1878 a creditor who had insured his debtor's life and then murdered him for the insurance money was convicted and hanged. *Trial of Hunter for the Murder of Armstrong*, 13 Am. St. Tr. 57. A contract binding a physician for a specified sum to give medical attention to a patient for life, has been held not against public policy as furnishing an incentive to a crime. *Zeigler v. Ill. Trust Co.* 245 Ill. 180, 91 N. E. 1041.

¹ *Tucker v. West*, 29 Ark. 386; *Kepner v. Keefer*, 6 Watts. 231, 31 Am. Dec. 460; *Adams v. Gay*, 19 Vt. 365; *Bloom v. Richards*, 2 Ohio St. 387; *Amis v. Kyle*, 2 Yerg. 31, 24 Am. Dec. 463; *Brown v. Brown*, 15 R. I. 422, 2 Am. St. Rep. 908; *Richmond v. Moore*, 107 Ill. 429; *Hellams v. Abercombe*, 15 S. C. 110, 40 Am. Rep. 684; *Horacek v. Keebler*, 5 Neb. 355; *Roberts v. Barnes*, 127 Mo. 405.

into on Sunday or on a week day would be illegal, because it requires or provides that something prohibited by the statute should be done on Sunday.²

But as to agreements made on Sunday to be performed on a week day there is much confusion in the decisions caused by the differing phraseology of the statutory provisions in the different States and the conflicting opinions of the judges in construing the meaning of the particular words and phrases therein used. Where the statute expressly prohibits the making of agreements on Sunday, there is no question that an agreement made on Sunday is void. But very few do this. When the words of the statute are that no "work or labor" is to be done on Sunday, this does not make illegal the signing of a promissory note or a mortgage or the entering into any other agreement on the Lord's day.³

"The idea of toil, of that which does or may produce weariness, is inseparable from the idea conveyed by the word labor, or, more strictly speaking, is included in the idea it conveys. But what toil, what weariness of the body or mind, is there in making half the contracts that are made. A meets B and says to him, 'I will give you fifty dollars for your horse.' B replies, 'Agreed.' Here is a contract made in ten seconds, and in ten words—but where is there any labor? C makes his promissory note, or bond, or due-bill, to D; who would think of calling the transaction laborious? The word 'labor' is

² *Handy v. St. Paul Pub. Co.*, 41 Minn. 188; *Smith v. Wilcox*, 24 N. Y. 353, 19 Barb. 581, 25 Barb. 341; *Bernard v. Luppings*, 32 Mo. 341; *Watts v. VanNess*, 1 Hill, 76.

³ *Bloom v. Richards*, 2 Ohio St. 387; *Kauffman v. Ham*, 30 Mo. 387; *More v. Clymer*, 12 Mo. (App.) 11; *Roberts v. Barnes*, 127 Mo. 415; *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Horacek v. Keebler*, 5 Neb. 355. But see *Contra. Reynolds v. Stevenson*, 4 Ind. 619, 322; *Cranston v. Goss*, 107 Mass. 439; *Costello v. Ten Eyck*, 86 Mich. 348; *Troewert v. Decker*, 51 Wis. 46; *Tucker v. West*, 29 Ark. 386. A contract of marriage on Sunday is valid. *Bennett v. Brooks*, 9 Allen 118. See *Gangwere's Estate*, 14 Pa. St. 417, 53 Am. Dec. 554; *Hayden v. Mitchell*, 30 S. E. Rep. 287 (Ga.). Giving a promissory note is "business of a secular calling." *Varney v. French*, 19 N. H. 283, and so is the loaning of money. *Trowert v. Decker*, 51 Wis. 46, 37 Am. Rep. 808; and the signing of a petition, *DeForth v. R. Co.*, 52 Wis. 320, 38 Am. Rep. 737; *Kilby v. Fitzpatrick* (Iowa), 187 N. W. 580.

usually employed to signify manual exertion of a toilsome nature. This is its ordinary, popular signification; the meaning that must be given to it, wherever it occurs in a statute, unless it is plainly used in a more enlarged or restricted sense. That it is not used in its most enlarged sense, in our statute, is obvious. Mere thought may be so earnest and long-continued as to be laborious, but no one would think of punishing a man simply for thinking. To compose and write an ordinary letter of friendship is no small task to many persons, but surely it is not 'common labor,' though it is a very common occurrence. The study of mathematics or metaphysics is often called 'hard work,' but it may, nevertheless, be performed on Sunday. There is a limit, then, and what better limit can be found than that furnished by the common understanding of the phrase 'common labor.' . . . Will it be said that written contracts are embraced by it because writing is a manual labor? The fact is not so in a large majority of cases. By far the most numerous written agreements are promissory notes. To write such a note requires some manual exertion, but no labor, in the proper or common signification of the word. Nor is it to be supposed that the legislature intended to discriminate between these contracts, and allow the verbal and forbid the written, or to make the validity of a contract depend upon whether it is long or short. There would be no good sense in such discriminations, and a thing so irrational is not to be admitted. It is not to be understood, however, that because a Sunday contract may be valid, therefore business may be transacted upon that as upon other days; as, for instance, that a merchant, not of the excepted class, may lawfully keep open store for the disposition of his goods on the Sabbath. To wait upon customers, and receive and sell his wares, is the common labor of a merchant, and there is a broad distinction between pursuing this avocation and the case of a single sale out of the ordinary course of business."⁴

Where the statute forbids the exercise of one's "ordinary calling" on Sunday to make a note or deed or other agreement on Sunday is not illegal if it is outside the sphere of

⁴ Thurman, J. in *Bloom v. Richards*, 2 Ohio St. 387; *Thomas v. St. Joseph*, 231 S. W. 63.

his usual business.⁵ So to hire a servant on Sunday is not within this phrase⁶ nor is the sale of goods on that day by one not a merchant or trader⁷. In an early case, D who was a banker sent his horse to H who kept a stable for the sale of horses by auction; H sold the horse to the defendant on Sunday by private sale. It was held that the sale was valid, the court saying:

“To bring this case within the act, we must pronounce that either D or H worked within their ordinary callings on the Sunday. But the sale of horses by private contract was not D’s ordinary calling, nor was it H’s: his calling was that of horse auctioneer, and he was not within his ordinary calling in selling his horse by private contract.”⁸

§ 291. *Works of Necessity or Charity.*

The statutes generally except acts or works of necessity or charity. “By the word ‘necessity,’ ” it is said, “we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of any particular case.”¹ Therefore an agreement for the relief of a sick pauper;² or to preserve property exposed to imminent danger;³ or to assist in the building of a church;⁴ or to secure decent burial for one’s wife, and to secure the presence of relatives at her funeral;⁵

⁵ *Sanders v. Johnson*, 29 Ga. 576; *Allen v. Gardner*, 7 R. I. 22; *Schneider v. Sansom*, 62 Tex. 201, 50 Am. Rep. 521.

⁶ *King v. Inhabitants*, 7 B. & C. 596.

⁷ *Merritt v. Earle*, 31 Barb. 38; *Millis v. Williams*, 16 S. C. 593; *Moore v. Murdock*, 26 Cal. 514.

⁸ *Drury v. Defontaine*, 1 Taunt. 131.

¹ *Flagg v. Millbury*, 4 Cush. 243.

² *Aldrich v. Blackstone*, 128 Mass. 148.

³ *Whitcomb v. Gilman*, 35 Vt. 297; *Parmelee v. Wilks*, 22 Barb. 539.

⁴ *Allen v. Duffie*, 43 Mich. 1, 38 Am. Rep. 159; *Dale v. Knepp*, 98 Pa. St. 389, 42 Am. Rep. 624. Contra. *Catlett v. Trustees*, 62 Ind. 365, 30 Am. Rep. 197.

⁵ *Gulf, etc., R. R. Co. v. Levy*, 59 Tex. 542.

or to convey property by a person suffering from serious injuries⁶ would come within these words of exception.

As to whether the publishing and circulating a newspaper on Sunday is a work of necessity the authorities are in conflict.⁷

Though the agreement made on Sunday may be void yet a party to it cannot set up its illegality against an assignee without notice. Thus the assignee of a non-negotiable instrument or the holder of a bill or note dated on a week day cannot be met by the defense that it was actually made on Sunday. This is on the ground of estoppel.⁸

§ 292. *Agreements Partly Made on Sunday.*

An agreement not finally executed on Sunday is not void because some of its terms may have been agreed to on that day;¹ as for example an agreement made on Sunday and carried into effect on a week-day;² or a note signed on Sunday, but not delivered until a week day;³ or a sale of goods agreed upon on Sunday, and the goods selected and set apart, the delivery being made on Monday,⁴ or an insurance policy delivered on Monday, though the property was examined and the amount of insurance agreed upon on a Sunday.⁵

⁶ *Donovan v. McCarthy*, 34 Cent. L. J. 170 (Mass.).

⁷ *Handy v. St. Paul Co.*, 41 Minn. 188; *Pulitzer Pub. Co. v. McNichols*, 181 S. W. 1 (Mo.).

⁸ *Johns v. Baily*, 45 Ia. 241; *Leightman v. Kadetska*, 58 Ia. 676, 63 Am. Rep. 129; *Ball v. Powers*, 62 Ga. 757; *Heise v. Bumpass*, 40 Ark. 575; *Cranston v. Goss*, 107 Mass. 439, 9 Am. Rep. 45; *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28; *Beman v. Wessels*, 53 Mich. 594.

¹ *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *Dickenson v. Richmond*, 97 Mass. 45; *Gibbs Manfg. Co. v. Brucker*, 111 U. S. 597; *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 231. But see *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179.

² *Taylor v. Young*, 61 Wis. 314.

³ *King v. Fleming*, 72 Ill. 21, 22 Am. Rep. 131; *Lovejoy v. Whipple*, 18 Vt. 379, 46 Am. Dec. 157; *Burns v. Moore*, 76 Ala. 339, 52 Am. Rep. 332.

⁴ *Rosenblatt v. Townsley*, 73 Mo. 536.

⁵ *Wolliver v. Ins. Co.*, 104 Mich. 132, 62 N. W. Rep. 149.

§ 293. *Rescission and Ratification.*

An agreement which could not be lawfully made on Sunday cannot, if lawfully made, be rescinded on that day.¹ As to whether a contract made on Sunday, and therefore void, can be ratified by a subsequent agreement, there is a conflict in the decisions; a large number of them holding that a ratification may be made;² a few of them that it may not.³

(b)

AGREEMENTS IN BREACH OF COMMON LAW RULES.

§ 294. *Introductory.*

An agreement whose object is forbidden by the common law because it is either a criminal offense or a civil wrong is void for illegality—for it is immaterial whether the thing forbidden by law is *malum in se*¹ or merely *malum prohibitum*.² Many things are now prohibited by statute which were formerly prohibited by the common law and which, but for the statute, would still be so prohibited. And many acts which are prohibited by the common law in one state are prohibited by statute in another. Therefore in this division of the subject we shall treat of those acts which were forbidden by the common law, though they may be now in most jurisdictions prohibited also by statute.

¹ *Benedict v. Bachelder*, 24 Mich. 425, 9 Am. Rep. 130.

² *Adams v. Gay*, 19 Vt. 358; *Melchoir v. McCarty*, 31 Wis. 256, 11 Am. Rep. 605; *Winchell v. Carey*, 115 Mass. 560, 15 Am. Rep. 151; *Wilson v. Milligan*, 75 Mo. 41; *Parker v. Pitts*, 73 Ind. 597, 38 Am. Rep. 155; *Tennent Shoe Co. v. Roper*, 94 Fed. 739.

³ *Plaistead v. Palmer*, 63 Me. 576; *Riddle v. Keller*, 48 Atl. 818 (N. J.).

¹ *Wheeler v. Russell*, 17 Mass. 258; *Wells v. People*, 71 Ill. 532; *Byrd v. Hughes*, 84 Ill. 174.

² *Penn v. Bornman*, 102 Ill. 523; *Bank v. Owens*, 2 Pet. 527; *White v. Buss*, 3 Cush, 448.

§ 295. *Agreements With Alien Enemies.*

An agreement with an alien enemy is illegal and void, not on any ground of public policy, but because "it was a principle of the common law that trading with an enemy without the king's license was illegal in British subjects."¹

§ 296. *Agreements to Commit Crime.*

An agreement to commit a crime is illegal as in breach of a rule of the common law when the crime is a common law offense, and in breach of a statute when it is a statutory offense.¹ Illustrations of agreements void because made in furtherance of the commission of a crime are an agreement by which one of the parties undertakes to make an assault on a third person;² or to abduct another;³ an agreement with a printer to print or a publisher to sell a libelous book;⁴ an agreement to write an immoral book;⁵ an agreement to indemnify the publisher of a libel;⁶ an agreement looking to the commission of a nuisance;⁷ or to indemnify another for committing a willful and malicious trespass;⁸ or an agreement to marry where the parties are already married to the

¹ Potts v. Bell, 8 T. R. 438; Kershaw v. Kelsey, 100 Mass. 561; Montgomery v. U. S., 15 Wall. 395; Schofield v. Eichelberger, 7 Pet. 586; U. S. v. Grossmeyer, 9 Wall. 72; Rhodes v. Summerhill, 4 Heisk. 204.

² Collins v. Blantern, 2 Wils. 347; Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 517; Evans v. Collier, 79 Ga. 315, 4 S. E. Rep. 264; Griffiths v. Hardenbergh, 41 N. Y. 464; Cumpston v. Lambert, 18 Ohio 81, 51 Am. Dec. 442.

³ Allen v. Rescous, 2 Lev. 174.

⁴ Barker v. Parker, 23 Ark. 390.

⁵ Popplett v. Stockdale, 1 R. & M. 337.

⁶ Gale v. Leckie, 2 Stark, 98.

⁷ Arnold v. Clifford, 2 Sum. 238; Atkins v. Johnson, 43 Vt. 78, 5 Am. Rep. 260.

⁸ Friend v. Porter, 50 Mo. (App.) 89.

⁹ Ives v. Jones, 3 Ired. 538, 40 Am. Dec. 421.

knowledge of each other, for this would be an agreement to commit bigamy.⁹

§ 297. *Agreements to Commit Civil Wrong.*

An agreement whose object is a legal wrong against a third person, is illegal although the wrong may not be a crime either at common law or by statute.¹ As for example an agreement to slander or publish a libel upon a third person where such publication was not indictable but only actionable;² or to commit a civil trespass upon his property³ or to infringe a patent copyright, or trade-mark belonging to another.⁴

§ 298. *Agreements to Defraud Third Persons.*

Fraud is a civil wrong, and therefore an agreement whose object is to defraud a particular individual or individuals is void.¹ Agreements to defraud creditors fall under this head, as for example a provision in an assignment for the benefit of creditors whose intent is to hinder and delay them in the payment of their claims;² or where in the case of a composition deed, a secret agreement is made with one creditor for a

⁹ Paddock v. Robinson, 63 Ill. 99, 14 Am. Rep. 112.

¹ Randall v. Howard, 2 Black, 585.

² Hays v. Hays, 8 La. Ann. 468.

³ Evans v. Collier, 79 Ga. 315, 4 S. E. 264; Stanton v. McMullen, 7 Ill. App. 326; Fuller v. Rice, 52 Mich. 435, 18 N. W. 204.

⁴ Nichols v. Ruggles, 3 Day, 145, 3 Am. Dec. 262.

¹ Thomas v. Caulkett, 57 Mich. 392, 24 N. W. Rep. 154, 58 Am. Rep. 369; Kelly v. Scott, 49 N. Y. 595; Gray v. McReynolds, 65 Iowa 461, 21 N. W. 777, 54 Am. Rep. 16; Ellicott v. Chamberlin, 38 N. J. Eq. 104, 48 Am. Rep. 327; Davis v. Jones, 94 Ky. 320, 22 S. W. 331; Begbie v. Phosphate Co., L. R. 10 Q. B. 497. A secret agreement with an employe of another company that he will leave their employment, the object being to embarrass it as a competitor, is void. Rhoades v. Malta Vita Co., 149 Mich. 235, 112 N. W. 940; Wilson v. McKleroy (Ala.), 89 S. 584.

² Mackie v. Cairns, 5 Cow. 547, 15 Am. Dec. 477; Knight v. Packer, 12 N. J. (Eq.) 214, 72 Am. Dec. 388; Haydock v. Coope, 53 N. Y. 69.

preference over the others, whether by paying him or promising to pay him a larger sum than the others are to receive, or giving him better security for his claim.³ So conveyances of property both real and personal not made in good faith and upon a valuable consideration but with the intention of hindering, delaying or defrauding creditors, are void as a fraud upon existing creditors.⁴ So a voluntary conveyance by a husband to his wife of his property is invalid as to his creditors, as a fraud on them, in that it withdraws from his estate property or money which should in right and justice go to them in payment of their claims.⁵

§ 299. *Agents and Persons in Fiduciary Relations.*

We have seen that on the principle that an agent shall not be allowed to put himself in a position in which his interest and his duty will conflict, an agent is subject to a number of disabilities while acting in that capacity, among the most important of which are that he shall not deal on his own account in the business of the agency; shall not act as agent for both parties; shall not take advantage of his position to make a private profit for himself, and shall not do any act inconsistent with the interests of the principal.¹ The rule embraces all classes of agents—general and special agents, attorneys, auctioneers, brokers and factors—and extends to all persons not strictly agents, but holding fiduciary relations

³ O'Shea v. Collier White Lead Co., 42 Mo. 397; Cobleigh v. Pierce, 32 Vt. 788; Way v. Langley, 15 Ohio St. 392; Lawrence v. Clark, 36 N. Y. 128.

⁴ Twyne's Case, 3 Coke, 80; Whittlesey v. McMahon, 10 Conn. 141; Avery v. Street, 6 Watts, 248.

⁵ Clark v. Killian, 103 U. S. 766; Jones v. Clifton, 101 U. S. 225; Story v. Marshall, 24 Tex. 305; 76 Am. Dec. 106; Phillips v. Meyers, 82 Ill. 67, 25 Am. Rep. 295.

¹ Ante. Chap. V. There is a conflict of authority as to the right of officials having to do with tax sales, to buy at such sales. See note to Okanogan Power Co. v. Quackenbush, 182 Pac. 618 (Wash.) in 5 A. L. R. 969.

to others, as, for instance, partners, guardians, directors and officers of corporations, executors and other trustees.²

Every agreement whose object is to influence by apparently disinterested advice the conduct of a third person falls under this rule, as for example a contract by the relatives of a property owner to pay an attorney for services in advising him with respect to the disposition of the property so as to secure for them an interest therein.³

The principle is well illustrated by the case of *Bollman v. Loomis*,⁴ where a woman who was thinking of buying a piano and had looked at one at A's store, brought with her a friend B whose opinion she valued to advise her. A secretly promised B that if the woman purchased the piano he would pay him a commission. She bought the piano; but it was held that B could not recover the money promised.

"The party proposing to purchase was deceived. Instead of getting, as she supposed she was, the opinion of the plaintiff as an expert, without bias and without interest, acting merely as a friend, the plaintiff was in fact acting as the agent of the owner, and charging fees for his services. A sale having been effected through his influence, this suit was brought to obtain a compensation. We think there should be no recovery. We reach this result not out of any regard for the defendant; he is as fully implicated in the deception practiced on the purchaser as the plaintiff himself. The rule in such cases is, that the law leaves the parties where it finds them. The transaction was inconsistent with fair and honorable dealing, contrary to sound policy, and offensive to good morals. We do not say that the plaintiff or defendant committed a positive

² *Thomas v. Matthews*, 113 N. E. 669 (Ohio); *Byrd v. Hughes*, 84 Ill. 174, 25 Am. Rep. 442; *Atlee v. Fink*, 75 Mo. 100, 43 Am. Rep. 385; *Jackson v. McLean*, 100 Mo. 130, 13 S. W. 393; *Attaway v. Bk.*, 93 Mo. 485; *Woodstock Iron Co. v. Richmond Co.*, 129 U. S. 643; *Holcomb v. Weaver*, 136 Mass. 265; *McDonald v. Houghton*, 70 N. C. 393; *Noel v. Drake*, 28 Kan. 265; *Forbes v. McDonald*, 54 Cal. 98. As to an executor or administrator purchasing at his own sale, see note to *Haymond v. Hyer*, 92 S. E. 854 in L. R. A. B. 1918; *Hoge v. George* (Wyo.), 200 P. 96.

³ *Flack v. Warner*, 278 Ill. 368, 116 N. E. 202.

⁴ 41 Conn. 581.

fraud. The plaintiff may have said nothing as to this piano which he did not believe to be true, and the defendant may have demanded and obtained for it no more than it was really worth. But the means resorted to to effect the sale, deceived and misled the purchaser, and were in violation of private confidence. Such contracts and acts are deemed equally reprehensible with positive fraud. They are within the same reason and mischief as contracts made and acts done with an evil intent, and are therefore prohibited by law."

Such agreements are sometimes said to be against public policy, because it is the policy of the law to secure fidelity in the discharge of their duties by all persons holding such positions of trust and confidence, but it is more accurate to say that, tending to cause unfaithful conduct by fiduciaries, they are illegal because they are agreements to wrong or defraud the persons whose interests the fiduciaries have in charge.⁵

§ 300. *Frauds Upon Marital Rights.*

Secret and voluntary conveyances of her property made by a woman engaged to marry may be set aside at the suit of the husband, as a fraud upon his marital rights.¹ The husband must show: 1. That there was an engagement between the parties at the time of the conveyance, for a conveyance before any contract to marry is not a fraud on marital rights.² 2. That the settlement was not known to him until after the marriage,³ for although the conveyance of her property is a

⁵ Harriman Contr., § 210.

¹ 2 Kent's Com. 174, 12 ed.; Spencer v. Spencer, 3 Jones (Eq.), 404; Williams v. Carll, 9 N. J. (Eq.), 543; Freeman v. Hartman, 45 Ill. 57, 92 Am. Dec. 193; Hall v. Carmichael, 8 Baxt. 211, 35 Am. Rep. 696; Manes v. Durant, 2 Rich. (Eq.) 404, 46 Am. Dec. 65.

² Butler v. Butler, 21 Kas. 521, 30 Am. Rep. 441; Wilson v. Daniel, 13 B. Mon. 348; Gregny v. Winston, 23 Gratt. 102.

³ Prather v. Burgess, 5 Cranch. 376; McClure v. Miller, 1 Bailey (Eq.) 107, 21 Am. Dec. 522; Charles v. Charles, 8 Gratt. 486, 56 Am. Dec. 155.

good ground for his refusing to marry her,⁴ yet if he knows of the conveyance and still chooses to marry he has no remedy. For the same reason the secret conveyance by the husband just before marriage of his property is a fraud on the wife,⁵ to the extent at least of her dower in the real property conveyed.⁶ Though the right of a wife to dower in the personal estate of her husband gives her no claim on any of his chattels before his death and he has therefore a perfect right to dispose of them in any way, yet he may not do so in expectation of death with a view to defeat the widow's dower. In such case:

“Equity will set aside the fraudulent conveyance in so far as it affects the rights of the widow; charge the fraudulent grantee or donee with a trust in her favor and require him to make good to her that which she would have received out of the property thus conveyed or given away, if no such gift or conveyance had been made.”⁷

While it has been held by some of the courts that the conveyance is fraudulent even though its object is to provide in a reasonable manner for children by a former marriage,⁸ the better doctrine seems to be that the duty of a father to his children by a deceased wife is as great as that to a woman he is seeking to marry,⁹ and that if the conveyance is made in good faith and to a reasonable amount, it will stand in the

⁴ Pollock Contr. 248, *St. George v. Wake*, 1 Myl. & K. 610; *Cheshire v. Payne*, 16 B. Mon. 618.

⁵ Schouler on Husband & Wife, 357; *Thayer v. Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75. But see *Hamilton v. Smith*, 57 Iowa, 15, 42 Am. Rep. 39.

⁶ *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501; *Smith v. Smith*, 12 Cal. 217, 73 Am. Dec. 533; *Cranson v. Cranson*, 4 Mich. 230, 66 Am. Dec. 534.

⁷ *Streat v. O'Neill*, 13 Mo. (App.) 586, 84 Mo. 68; *Rice v. Waddell*, 168 Mo. 99, 67 S. W. 605; *Walker v. Walker*, 31 Atl. 14 (N. H.).

⁸ *Ramsay v. Joyce*, 1 McMull (Eq.), 236, 37 Am. Dec. 550; *Manes v. Durant*, 2 Rich. (Eq.), 404, 46 Am. Dec., 65.

⁹ *Butler v. Butler*, 21 Kas. 521, 30 Am. Rep. 441.

case of children of the grantor.¹⁰ Many of the authorities¹¹ go to the extent of holding that the conveyance is fraudulent even though the other did not know that the person possessed such property until after the marriage. But this conclusion is criticised in other cases and the rule is said to be that the conveyance is no fraud unless the one party knew of the property and the other had made representations in regard to it, which had entered into and operated as an inducement to the marriage.¹²

§ 301. *Agreements Between Creditor and Debtor Affecting Surety.*

It is an every-day occurrence that A in making a contract with B obtains C to guarantee that he (A) will fulfill it. This is called a contract of guaranty or surety-ship and C is described as the guarantor or surety. And because it is obvious that as all C in such case intended to do was to stand responsible for the performance of the agreement by A as it was originally made, any contract or dealing by the creditor (B) with the principal debtor (A) which amounts to a variation from the contract by which the surety (C) was to be bound, and which might vary or enlarge the latter's liability without his consent, operates as a discharge of his liability as surety.¹ The surety has a right to be consulted in the matter "and if he is not or does not consent he will be no longer bound, and the court will not inquire whether it is or is not to his injury."² C for example is discharged

¹⁰ *Butler v. Butler*, supra; *Jones v. Cole*, 2 Bailey 303, 2 Kent. Com. 175.

¹¹ See *Pollock Contr.* 247 and cases cited.

¹² *Alkire v. Alkire*, 32 N. W. Rep., 571 (Ind.).

¹ *Mayhew v. Boyd*, 5 Md. 102, 59 Am. Dec. 101; *Smith v. Tunno*, 1 McCord, 443, 16 Am. Dec. 617; *New Plow Co. v. Walinsley*, 110 Ind. 242.

² *Paine v. Jones*, 76 N. Y. 274; *Rowan v. Sharp's Rifle Man. Co.*, 33 Conn. 1; *Bensinger v. Wren*, 100 Pa. St. 500.

when B releases or promises by a valid agreement to release A from his obligation,³ or where B, holding other securities for the payment of the debt or the performance of the agreement, releases them.⁴ So an extension of the time of payment or performance is such as material alteration of the contract as will discharge the surety whether he is prejudiced by the extension or not.⁵ And, in fine, if the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.⁶

Where a surety guarantees the due performance of an office, employment or agency, any material alteration in the duties stipulated for, without consent of the surety, discharges him from liability.⁷ But the undertaking of an additional office or other duties, unless materially affecting or altering the former, does not affect the guaranty, unless the surety has stipulated against it.⁸

³ *Baird v. Rice*, 1 Call. 18, 1 Am. Dec. 497; *Bowen v. Cobb*, 31 Fed. 678. Unless B in his agreement, expressly reserves his right against C. *Kearsley v. Cole*, 16 M. & W. 135; *Kenworthy v. Sawyer*, 125 Mass. 28; *Morgan v. Smith*, 70 N. Y. 537.

⁴ *New Hamp. Sav. Bk. v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685; *Blydenburgh v. Bingham*, 38 N. Y. 371, 98 Am. Dec. 49; *Baker v. Briggs*, 8 Pick. 121, 19 Am. Dec. 311.

⁵ *Brown v. Wright*, 7 T. B. Mon. 393, 18 Am. Dec. 190; *Lime Rock Bank v. Mallett*, 34 Me., 547, 56 Am. Dec. 673; *Post v. Losey*, 111 Ind. 75, 60 Am. Rep. 677.

⁶ *Insurance Co. v. Scott*, 81 Ky. 540; *White v. Life Assn. of America*, 63 Ala. 419; *Walsh v. Colquitt*, 64 Ga. 740.

⁷ *Mumford v. R. Co.*, 2 Lea. 393, 31 Am. Rep. 616; *Manuf. Nat. Bank v. Dickerson*, 41 N. J. (L.) 448, 23 Am. Rep. 237; *Home Sav. Bank v. Traube*, 75 Mo. 199, 42 Am. Rep. 402; *Mayor v. Kelly*, 98 N. Y. 467, 50 Am. Rep. 699.

⁸ *Rollstone Bk v. Carleton*, 136 Mass. 226; *Lane's Appeal*, 112 Pa. St. 497.

§ 302. *Agreements to Defraud the Public.*

Agreements whose object is to defraud the public are likewise void though the act itself is not a criminal act. Examples of this are found in an agreement for the sale of domestic sardines to be packed in boxes with labels representing them as foreign sardines;¹ in an agreement by which a tradesman having a reputation as a seedsman sells his empty bags with their labels to another to be filled and sold by him in a certain district as seeds grown by the former,² in an agreement between two physicians whereby one is to personate the other at his office for the purpose of medical practice,³ in an agreement by a musical director of great reputation to permit another to use his name for his musical organization.⁴

“Where a trade-mark consists of a name, how far it is capable of assignment is a difficult question. We think that the answer to this question depends upon the effect which the use of the name in each particular instance is shown to have upon the minds of the public. If it leads the public to believe that the particular goods are, in fact, made by the person whose name is thus stamped upon them, or in whose name they are advertised, whereas they are, in fact, made by another person, then such a use of the name will not be protected by the courts; for to do so would be to protect the perpetration of a fraud upon the public. Thus, if an author were to assign to another the privilege of publishing books with his name upon their title-page, or if a painter were to sell to another the privilege of placing the former’s signature on pictures painted by the latter, it cannot for a

¹ *Materne v. Horwitz*, 101 N. Y. 470.

² *Bloss v. Bloomer*, 23 Barb. 604; *Wilson v. McKleroy*, 89 S. 584.

³ “No man,” said the court, “has the right to sell his reputation or skill in any profession whatever it may be and thus enable an unknown party to perpetrate a fraud upon the public in his name.” *Jerome v. Bigelow*, 66 Ill. 452.

⁴ *Blakely v. Sousa*, 52 Cent. L. J. 129; *Messer v. The Fadettes*, 168 Mass. 140, 46 N. E. Rep. 407, 60 Am. St. Rep. 371.

moment be supposed that any court would protect such a supposed right, even as against the original assignor."⁵

Agreements whose object is to influence a quasi-public corporation to act for the private interest of one or several persons rather than for the interest of all the public are illegal—in short any agreement which has for its object the disabling of public agencies from performing their full duties to the public,⁶ or the thwarting of public enterprises,⁷ as for example an agreement to give property or money to a railroad in consideration of the company locating its station at a place chosen by the promisor, without regard to the public convenience.⁸

§ 303. *Same—Auction Sales.*

To raise the price of a thing put up at public auction is a fraud on the buyer.¹ Agreements, therefore, made between the auctioneer and the owner or between the owner and a third party by which one is to act as a "puffer," are illegal and cannot be enforced on either side: the puffer cannot recover the compensation promised for his services, and the purchaser on discovering the fraud may return the property or refuse to be bound by his bid.² But it is not illegal to place a limit on the price below which the property must not be sold, and to withdraw it if it does not reach that figure,³ nor to employ a person to make fictitious bids for

⁵ *Skinner v. Oaks*, 10 Mo. (App.) 57.

⁶ *Choteau v. R. Co.* 22 Mo. (App.) 286; *Wiggins Ferry Co. v. R. Co.* 5 Mo. (App.) 577, 128 Mo. 225.

⁷ *Slocum v. Wooley*, 11 Atl. Rep. 264 (N. J.).

⁸ *Pueblo, etc., R. Co. v. Taylor*, 6 Col. 1, 45 Am. Rep. 512.

¹ 4 Cyc. 1044-1045.

² *Staines v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492; *McDowell v. Simms*, Busb. Eq. 130, 57 Am. Dec. 595.

³ *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Steele v. Ellmaker*, 11 Serg. & R. 86.

the sole purpose of preventing a sacrifice of the property offered for sale.⁴

Agreements made by bidders not to bid against each other with a view of preventing fair competition at an auction sale are illegal because they are a fraud on the owner of the property;⁵ though if the intention of the parties be simply to obtain small quantities of the property which they desire, the lots offered being larger than any one of them alone is able or desires to purchase, the agreement is valid.⁶

§ 304. *Fraud and Illegality Distinguished.*

It is important to distinguish fraud as a civil wrong from fraud as a vitiating element in a contract—which has been treated in a previous chapter.¹ Fraud as we have seen² may vitiate a contract not because it is a civil wrong but because as between the parties the fraud of one of them has prevented the consent of the other from being a genuine consent. The difference between *legality of object* and *reality of consent* may be illustrated thus: A by a fraudulent representation induces B to enter into a contract with him. The contract is voidable by B because his consent was not genuine or real. C and D enter into a contract the object of which is to defraud E. The contract is void because C and D have agreed to do what is illegal.

⁴ Wolfe v. Lyster, 1 Hall, 146; Reynolds v. Dechaums, 24 Tex. 174, 76 Am. Dec. 101; Steele v. Ellmaker, 11 Serg. & R. 86; Smith v. Greenlee, 2 Dev. 126, 18 Am. Dec. 564; McMillan v. Harris, 35 S. E. 334 (Ga.).

⁵ 4 Cyc. 1044-1045.

⁶ Marie v. Garrison, 83 N. Y. 14; Wicker v. Hoppoch, 6 Wall. 94; Garrett v. Moss, 20 Ill. 549; National Bk. v. Sprague, 20 N. J. Eq. 159.

¹ Ante § 228.

² Ante § 228.

(c)

AGREEMENTS AGAINST PUBLIC POLICY.

§ 305. *Introductory.*

A contract may be illegal and yet its making or its performance entail no penalty. Yet if in the opinion of the court its tendency is contrary to the public welfare, it will not be enforced.

Public policy is a phrase of frequent occurrence in the law reports and yet not capable of any very exact definition. It is difficult to find its earliest application; it is said by an eminent authority¹ that the doctrine of public policy originated in the endeavor to elude the binding force of wagering agreements. "Public policy," once said an old-time judge, "is a restive horse, and when once you get astride of it there is no knowing where it will carry you." Modern decisions, while maintaining the duty of the courts to consider the public advantage, have tended to limit the sphere within which this duty has been exercised, and the modern view that courts should hold themselves bound to the observance of extreme caution when called upon to declare a contract void on the ground of public policy and prejudice to the interest of the public,² is expressed by Jessel, M. R., in *Printing Company v. Sampson*,³ where he says:

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the

¹ Pollock on Contr. 272; Anson is of the opinion that it originated in agreements in restraint of trade. Anson Contr. 197.

² *Atlantic Coast Line Co. v. Beazley*, 54 Fla. 311, 45 South. 761; *Mut. Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295; *Zeigler v. Ill. Trust Co.*, 245 Ill. 180, 91 N. E. 1041.

³ 19 Eq. 462.

utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with the freedom of contract.’’

The public policy of a State or Nation is found in its Constitution and statutes and in its common law as set out in the opinions of its highest courts.⁴ It is well settled that there are certain kinds of agreements which are illegal, not because they are in breach of statutes or of express rules of law but because they infringe certain tendencies or principles of the law, and such agreements are spoken of as being against the policy of the law or public policy.⁵

An agreement is not void as against public policy, unless it is injurious to the interests of the public, or contravenes some established interest of society.⁶ But where an agreement belongs to that class, it will be declared void, although in the particular instance, no injury to the public may have resulted.⁷ Thus an agreement to influence legislation is void, although the legislation sought may be clearly beneficial. An agreement to influence an appointment to office is void, although the intent may be to secure the best qualified person; and agreements whose tendency is to establish a monopoly are void, although they may not in the particular case destroy competition or enhance prices. It is hardly necessary to observe that public policy varies with time and place, and that what may be against public policy at one time or in one state or country may not be so in another. The public policy of different countries and of different states of the Union, on the subject of wagers and lotteries, of mixed

⁴ *Couch v. Hutchinson*, 2 Ala. App. 444, 57 South. 75; *Logan v. Postal Tel. Co.*, 157 Fed. 570; *Lewis v. Harris Trust Co.*, 188 Ill. App. 544.

⁵ 9 Cyc. 481, 13 C. J. 425.

⁶ *Peterson v. Christensen*, 20 Minn. 377.

⁷ 9 Cyc. 481, 13 C. J. 425.

marriages, of Sunday observance, of the liquor traffic, and the like, is not the same.

Agreements of this character may be classified under seven heads, viz.:

I. Agreements tending to injure the public service.

II. Agreements tending to obstruct the course of public justice.

III. Agreements tending to encourage litigation.

IV. Agreements contrary to good morals.

V. Agreements which affect the freedom or security of marriage.

VI. Agreements which restrain the freedom of trade.

VII. Agreements which affect the security of property and life or one's duty towards others.

§ 306. *Agreements to Influence Legislative Action.*

What are called "lobbying contracts," *i. e.*, agreements to render services in securing legislative action through personal influence with a legislative body, whether it be congress, a state legislature or a municipal council, or through other corrupt and objectionable means, are illegal and void;¹ as for example, an agreement for general services in procuring legislation;² or to prevent legislative investigation into the affairs of a railroad company;³ or to grant certain privileges in consideration of the withdrawal of opposition to the passage of an act through the legislature⁴ or to pay a member of Congress for services rendered by him in securing the payment of a claim required to be authorized by Congress.⁵

¹ 9 Cyc. 486; 13 C. J. 368; *Basket v. Moss*, 20 S. E. Rep. 734 (N. C.).

² *Id.*

³ *Usher v. McBratney*, 3 Dill. 385; *Metrinko v. Chomin* (Pa.), 29 Pa. Dist. 761.

⁴ *Pingry v. Washburn*, 1 Aiken, 264, 15 Am. Dec. 675.

⁵ *Weed v. Black*, 2 McAr. 268, 29 Am. Rep. 618.

§ 307. *Agreements to Influence Administrative and Executive Action.*

So agreements are void whose objects or the services to be rendered under which, are to procure from any department of the government, national, State or municipal, administrative or executive contracts, or any kind of official action.¹

“There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements.”²

Therefore the following have been held illegal: Agreements to endeavor to obtain from a cabinet officer a valuable contract for supplying arms to the government,³ to use one's influence with a municipal council to procure a lease,⁴ not to compete with a person in making bids for the carrying of the mail or other government contract or to share in the result,⁵ to secure the removal or location of a public building;⁶ guaranteeing to pay a sum of money to certain per-

¹ *Basket v. Moss*, 20 S. E. Rep. 734; *Oscanyar v. Arms Co.*, 103 U. S. 261; *Cook v. Shipman*, 24 Ill. 614, 51 Ill. 316; *Meguire v. Corwine*, 101 U. S. 108; *Devlin v. Brady*, 36 N. Y. 531; *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69; *Brooks v. Cooper*, 50 N. J. Eq. 761, 26 Atl. Rep. 978, 35 Am. St. Rep. 793; *Hope v. Linden Park Assn.*, 34 Atl. Rep. 1070 (N. J.); *Boyle v. Adams*, 50 Minn. 255, 52 N. W. Rep. 260; *Kaufman v. Catzen*, 94 S. E. 338 (W. Va.).

² *Tool Co. v. Norris*, 2 Wall. 45; *Wright v. Fissell* (N. J.), 113 A. 699.

³ *Tool Co. v. Norris*, 2 Wall. 45.

⁴ *Wall v. Charlick*, 8 N. Y. Leg. Obs. 230; *Pease v. Walsh*, 49 How. Pr. 269.

⁵ *Hannah v. Fife*, 27 Mich. 172; *Gulick v. Ward*, 9 N. J. (L.) 87, 18 Am. Dec. 389; *King v. Winants*, 71 N. C. 469, 17 Am. Rep. 11; *Swan v. Chorpeneing*, 20 Cal. 182; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678.

⁶ *County Commrs. v. Jones*, 1 Ill. 237; *Filson v. Himes*, 5 Pa. St. 452, 47 Am. Dec. 422; *Spence v. Harvey*, 22 Cal. 336, 83 Am. Dec. 69.

sons provided they will petition the common council of a city for street improvements,⁷ to pay a sum of money to a mail contractor if he will repudiate his contract for carrying the mail,⁸ with a collector of taxes in consideration that he will forbear to collect the taxes in the manner required by law,⁹ to endeavor to procure from the governor for a compensation a pardon for a convict,¹⁰ a note given to procure a party to sign a petition for executive clemency,¹¹ an agreement by a public prosecutor whose official duty was to prosecute for the violation of city ordinance that he would defend one charged under the ordinance is against public policy.¹²

§ 308. *Appointment of Public Officers.*

Agreements which have for their object the purchase or sale of a public office are illegal, for the public has a right to some better test of the capacity of its servants than the fact that they possess the means of purchasing their offices.¹ Therefore all agreements are void whose object is to influence the appointment of a person to a public office.

§ 309. *Agreements Influencing Elections.*

If there are any contracts, it has been well said,¹ upon which courts should put the stamp of their disapprobation, they are those curtailing or tending to curtail a free exercise of the elective franchise. Therefore agreements to use

⁷ McGuire v. Smock, 42 Ind. 1, 13 Am. Rep. 383.

⁸ Weld v. Lancaster, 56 Me. 453.

⁹ Packard v. Tisdale, 50 Me. 376.

¹⁰ Hatzfield v. Gulden, 7 Watts, 152, 32 Am. Dec. 750; Kribben v. Haycraft, 26 Mo. 396; Wildey v. Collier, 7 Md. 273, 61 Am. Dec. 346; Deering v. Cunningham, 63 Kas. 174, 65 Pac. Rep. 263.

¹¹ Buck v. Bank, 27 Mich. 302, 15 Am. Rep. 189; Haines v. Lewis, 54 Iowa, 301, 37 Am. Rep. 202.

¹² Hosford v. Eno, 168 N. W. 746, and note in L. R. A. 1918 F. 832.

¹ 9 Cyc. 494; 136 C. J. 438.

¹ Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548.

one's influence to promote the election of another to a public office,² to pay for services rendered by another as a canvasser at a primary election or as the proprietor of a newspaper to secure the promisor's nomination for an office;³ to pay the traveling expenses of a voter, or to remunerate him for his loss of time;⁴ to pay money in consideration of abandoning a petition against the return of a member for bribery,⁵ have all been held to be invalid.

§ 310. *Exceptions to the Foregoing Rules.*

The principles stated in the foregoing sections do not apply to agreements for purely professional services to be rendered openly, as the attorney or agent of another, in the way of preparing papers, presenting evidence and submitting arguments before public bodies, committees or heads of departments of the government. An agreement for contingent compensation for profession services of a legitimate character in prosecuting a claim pending in one of the executive departments is not illegal;¹ nor one to make a public argument before the legislature or its committees for or against an act;² nor one whereby one agrees for hire to work for the passage of bills by the legislature, or to place before the governor the arguments and petitions in favor of the pardon of a convict or to canvass and make speeches for a candidate for a public office, provided one does not conceal his interest in the matter, but lets it be known and understood

² Gaston v. Drake, *supra*; Nichols v. Mudgett, 32 Vt. 546; Swayze v. Hall, 8 N. J. (L.) 54, 14 Am. Dec. 399.

³ Keating v. Hyde, 23 Mo. (App.) 555; Livingston v. Page, 52 Atl. 965 (Vt.).

⁴ Cooper v. Slade, 6 El. & B. 447; Simpson v. Yeend, L. R. 4 Q. B. 626.

⁵ Coppock v. Bower, 4 Mees & W. 361.

¹ Stanton v. Embry, 93 U. S. 548; Southard v. Boyd, 51 N. Y. 177; Lynn v. Mitchell, 36 N. Y. 235.

² Bryan v. Reynolds, 5 Wis. 200, 68 Am. Dec. 55.

by the persons whose judgment he undertakes to influence.³ In such cases no fraud or wrong can arise where all parties, the government officers and agents and the public, fully understood the relation of each to the subject-matter of the transaction. The wrong which the courts strike down is the fraud practiced by a person's attempting to exert his influence with the agents of the government or the people and apparently giving disinterested advice, whereas he is in fact the person chiefly interested in the success of his undertaking.⁴

§ 311. *Salaries of Public Officers.*

The salary or emoluments of a public officer cannot be sold or assigned by the holder, and any agreement to do so is void as against public policy;¹ as for example the assignment by a clerk of a court of all the fees of his office,² or the assignment of the unearned pay of a retired army officer,³ or the unearned salary of a mail clerk.⁴ Said an English judge:

“It is fit that the public servants should retain the means of a decent subsistence and not be exposed to the temptations of poverty.”⁵

A contract with a public official to pay him more than his statutory salary for services within his official duty has been held void as against public policy.⁶

³ *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384.

⁴ *Wylie v. Cox*, 15 How. 415; *Taylor v. Bemiss*, 110 U. S. 42; *Sedgwick v. Stanton*, 14 N. Y. 289; *Workman v. Campbell*, 46 Mo. 305.

¹ *Palmer v. Bate*, 2 B. & B. 673; *Bliss v. Lawrence*, 58 N. Y. 442; *Bangs v. Dunn*, 66 Cal. 72; *Beal v. McVicker*, 8 Mo. App. 202.

² *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215; *Bowery Nat. Bk. v. Wilson*, 122 N. Y. 478, 19 Am. St. Rep. 507.

³ *Schwenk v. Wychoff*, 46 N. J. (Eq.) 560, 19 Am. St. Rep. 438.

⁴ *State v. Williamson*, 118 Mo. 146, 23 S. W. 1054.

⁵ *Foster v. Wells*, 8 M. & W. 149.

⁶ *Twiggs v. Wingfield*, 147 Ga. 790, 95 S. E. 711; *Dodson v. McCurnin*, 160 N. W. 927 (Ia.) and note L. R. A. 1907 C. 1093.

Even more reprehensible are agreements to assign a part of one's compensation as a public officer in consideration of an unlawful agreement on the part of the assignee; as, for example, an agreement by a candidate for a public office that if elected or appointed he will accept less than the compensation fixed by law⁷ or an agreement made before an election to share the salary and fees of an office in consideration of the plaintiff's using his influence to elect the defendant to such office;⁸ or withdrawing as a candidate,⁹ or an agreement by an applicant for an office to divide the receipts, in consideration that a rival applicant will withdraw or has withdrawn,¹⁰ or shall aid the other in obtaining the office.¹¹

§ 312. *Agreements Obstructing Course of Justice.*

Any agreement having a tendency to obstruct, impede or interfere with the administration of justice is void.¹ Under this head fall agreements to procure or suppress evidence,² to induce a witness to testify or to refrain from testifying, or to influence his testimony,³ to prevent a criminal prose-

⁷ Prentiss v. Dittmer, 93 Ohio St. 314, 112 N. E. 1021; State v. Nashville, 15 La. 697; Galpin v. Cook Co., 269 Ill. 27, 109 N. E. 713.

⁸ Gaston v. Drake, 14 Nev. 175, 33 Am. Rep. 548; Robinson v. Robinson, 65 Ala. 610.

⁹ Martin v. Frances, 173 Ky. 529, 191 S. W. 259.

¹⁰ Hunter v. Nolf, 71 Pa. St. 282; Martin v. Wade, 37 Cal. 168; Glover v. Taylor, 38 La. Ann. 634.

¹¹ Gray v. Hook, 4 N. Y. 449.

¹ Collins v. Blantern, 2 Wils. 341, 1 Smith's Lead. Cas. 490; Bierbaur v. Wirth, 10 Biss. 60; Brown v. Nat. Bk., 137 Ind. 655, 37 N. E. 158; Whitaker v. Richmond (Pa.), 73 Pa. Sup. 203.

² Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370. But an agreement to procure evidence for one of the parties to a suit is not always illegal. Hare v. McGue, 174 Pac. 663 (Cal.); Haley v. Hollenback, 53 Mont. 494, 165 Pac. 459.

³ Patterson v. Donner, 48 Cal. 369; Kennedy v. Hodges, 97 Ga. 753, 25 S. E. 493; Goodrich v. Tenney, 144 Ill. 442, 33 N. E. 44.

cution or to stifle it after it is begun,⁴ to interfere with the proper discharge of a judicial or other officer charged with the enforcement of the law:⁵ or to indemnify a sheriff, constable, or other officer, for an act to be done by him in violation or neglect of his official duty.⁶

§ 313. *Compounding Criminal Offenses.*

The compounding of crimes or misdemeanors is a crime itself at common law and hence agreements involving such intent either in whole or in part, are void, not only as against the policy of the law, but because the agreement is itself a crime.¹

“This is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law; and the reason why the common law says such contracts are void, is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this; no polluted hand shall touch the pure fountains of justice.”²

Therefore a bond, a deed, or other contract, the consideration of which is not to prosecute for an offense which has been committed is void.³

But a person whose property has been stolen or whose

⁴ Ormerod v. Dearman, 100 Pa. St. 561, 45 Am. Rep. 391; Rhodes v. Neal, 64 Ga. 704, 37 Am. Rep. 93; Barron v. Tucker, 53 Vt. 338, 38 Am. Rep. 684.

⁵ Wright v. Rindskopf, 43 Wis. 344; Rhodes v. Neal, 64 Ga. 704, 37 Am. Rep. 93; Wildey v. Collier, 7 Md. 273, 61 Am. Dec. 346; Ormerod v. Dearman, 100 Pa. St. 561, 45 Am. Rep. 391.

⁶ Webber v. Blunt, 19 Wend. 188; Denney v. Lincoln, 5 Mass. 385; Shotwell v. Hamblin, 23 Miss. 156, 55 Am. Dec. 83.

¹ Ante § 296, 9 Cyc. 505, 13 C. J. 451; Aycock v. Gill (N. C.) 111 S. E. 342.

² Collins v. Blantern, 2 Wils. 347.

³ Pearce v. Wilson, 111 Pa. St. 14, 56 Am. Rep. 243, Bredin's Appeal, 92 Pa. St. 241, 37 Am. Rep. 677; Rock v. Matthews, 35 W. Va. 531, 14 S. E. 137; McCoy v. Green, 83 Mo. 626; 1 Groesbeck v. Marshall, 44 S. C. 538, 22 S. E. 743; Partridge v. Hood, 120 Mass. 403.

rights have been interfered with may compromise with the wrong-doer—provided there is no agreement not to prosecute.⁴ A threat to prosecute by which a promise is forced from the wrong-doer while it may be considered as duress⁵ will not avoid the agreement for illegality.⁶ And even an agreement not to prosecute is not illegal, where it is made not for the sake of gain, but from motives of kindness and compassion⁷ or on account of relationship.⁸ Where the prosecution is criminal in form only, or the injury complained of is of a purely private and personal nature, in no way involving the interests of the public, an agreement for its settlement is not illegal.⁹

§ 314. *Agreements Ousting Jurisdiction of Courts.*

An agreement whose object is to prevent the courts from obtaining jurisdiction of a dispute is illegal,¹ as for example a promise that if one party breaks an agreement he shall not be sued for it² or an agreement that the decisions of the officers of a benefit association shall be final³ or preventing a party from bringing an action except in a particular court.⁴

⁴ Souhegan Bk. v. Wallace, 61 N. H. 24; Catlin v. Henton, 9 Wis. 476; Gunn v. Plant, 94 U. S. 664.

⁵ See ante § 258.

⁶ Powell v. Flanary, 109 Ky. 342, 59 S. W. Rep. 5; Ford v. Cratty, 52 Ill. 313; Cass County Bank v. Bricker, 34 Neb. 516, 52 N. W. 575; Weber v. Barrett, 125 N. Y. 18, 25 N. E. 1068.

⁷ Ward v. Allen, 2 Met. 53, 35 Am. Dec. 387.

⁸ Dodson v. Swan, 2 W. Va. 511, 98 Am. Dec. 787.

⁹ See 9 Cyc. 509. The statutes of some of the states permit the compromise of misdemeanors.

¹ New York Fidelity Co. v. Eickhoff, 63 Minn. 170, 65 N. W. Rep. 351; White v. R. Co., 135 Mass. 216; Voris v. Gage, 46 Okla. 748, 149 Pac. 150; Trustees v. Hoyle, 139 N. Y. S. 1098.

² Knorr v. Bates, 33 N. Y. Supp. 691, 35 Id. 1060.

³ Supreme Council v. Forsinger, 125 Ind. 52, 25 N. E. Rep. 52.

⁴ Nashua River Paper Co. v. Paper Co., 223 Mass. 8, 111 N. E. 678; Doyle v. Ins. Co., 94 U. S. 535; Mutual Reserve Co. v. Cleveland Mills, 82 Fed. 508; Nute v. Ins. Co., 6 Gray, 174; aliter where the restriction is to the courts of a particular state or county. Gitler v. Russian Co., 124 N. Y. App. Div. 273; Mittenhall v. Mascagni, 183 Mass. 19.

And partes are not allowed by agreement to vary the procedure in the courts prescribed by statute.⁵ On this ground an agreement has been declared illegal which attempted to shorten the time allowed by the statute of limitations for bringing suit,⁶ and some courts refuse to enforce conditions in promissory notes that if the note is not paid the maker will pay a stated attorney's fee, because the statutes prescribe the amount which may be taxed against a defeated litigant.⁷

And while we have seen that an agreement not to bring an action on a civil claim is a valid consideration for a promise⁸ yet if public interests are involved such an agreement will be void as against public policy—as for example an agreement not to prevent the obstruction of a public street⁹ or to withdraw a plea of usury¹⁰ or to make no defense to a suit for divorce.¹¹

A condition in an insurance policy that it shall be “incontestible” after a certain time, is usually valid¹² but not it seems as to a defense based on public policy.¹³

§ 315. *Maintenance and Champerty.*

Maintenance at common law is an officious intermeddling in a suit, that in no way belongs to one, by assisting either party, with money or otherwise, to prosecute or defend. It is said to be an offense against good morals in that it keeps

⁵ French v. Miller, 126 Ill. 611, 9 Am. St. Rep. 651.

⁶ French v. Ins. Co., 5 McLean, 461, 18 How. 404.

⁷ Witherspoon v. Musselman, 14 Bush, 214; Conn. Nat. Bk. v. Davidson, 22 Pac. 517 (Ore.).

⁸ Ante, Chap. IV.

⁹ Amestoy v. Electric Co., 95 Cal. 311, 30 Pac. Rep. 550.

¹⁰ Clark v. Spencer, 14 Kas. 398, 19 Am. Rep. 96.

¹¹ Loveren v. Loveren, 106 Cal. 509, 39 Pac. Rep. 801; Smutzer v. Stinson, 9 Colo. App. 326, 48 Pac. 314; Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208.

¹² Metro. Life Ins. Co. v. Oeeler, 176 Pac. 939 (Okla.), based on public policy.

¹³ Scarborough v. Inc. Co., 171 N. C. 353, 88 S. E. 482.

alive strife, and perverts the remedial powers of the law into an engine of oppression. In the United States there must be something vexatious in the maintenance; a purpose of stirring up strife and continuing unnecessary litigation.¹

Champerty is a species of maintenance, being a "bargain with a plaintiff or defendant to divide the land or other thing sued for between them if he prevails at law."² In many of the States, the common law of champerty exists, either by statute or by judicial decision,³ while in others the doctrine is rejected as being the product of an obsolete social system and inapplicable to the state of society of today.⁴ In others again it is held that it is an essential element of champerty that the person shall contribute to the expense of a litigation; and that therefore an agreement with an attorney that he is to receive as compensation for his services a portion of the subject-matter of the litigation is not champertous, unless he also agrees to pay or advance the costs and expenses of the suit.⁵

¹ *Thallhimer v. Brincherhoff*, 3 Cow. 623, 15 Am. Dec. 308; *Perine v. Dunn*, 3 Johns. Ch. 508; *McCall v. Capehart*, 20 Ala. 521; *Brown v. Bigne*, 28 Pac. Rep. 11.

² Bouv. Law Dict.

³ *Martin v. Clark*, 8 R. I. 389, 5 Am. Rep. 586; *Ackert v. Barker*, 131 Mass. 436; *Rust v. Larue*, 4 Litt. 112, 14 Am. Dec. 172; *Weakly v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194; *Thompson v. Marshall*, 36 Ala. 504, 76 Am. Dec. 328.

⁴ *Reece v. Kyle*, 36 N. E. 747; *Casserleigh v. Wood*, 59 Pac. 1024 (Colo.); *Ballard v. Carr*, 48 Cal. 74; *Richardson v. Rowland*, 40 Conn. 565; *Phillip v. South Park Commrs.*, 119 Ill. 629; *Fowler v. Callan*, 102 N. Y. 395.

⁵ *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314, 2 Mo. App. 1; *Martin v. Clark*, 8 R. I. 389, 5 Am. Rep. 586; *Blaisdell v. Ahern*, 144 Mass. 393, 59 Am. Rep. 99; *Stanton v. Embrey*, 93 U. S. 548; *Taylor v. Bemis*, 110 U. S. 42; *Stark Co. v. Mischel*, 173 N. W. 817 (N. D.) and note 6 A. L. R. 184. As to contracts by public bodies to pay attorneys contingent fees see note to *Mills v. Cheyenne Co.*, 96 N. W. 703, 148 N. W. 959, in L. R. A. 1917 D. 263.

§ 316. *Agreements to Refer to Arbitration.*

An agreement that matters which have arisen or may arise between the parties shall be referred to an arbitrator or arbitrators is not binding and either party may have recourse to the courts notwithstanding it.¹ The reason of the rule is by some traced to the jealousy of the courts and a desire to repress any attempt to encroach on the exclusiveness of their jurisdiction, and by others to an aversion on the part of the courts from reasons of public policy to sanction agreements by which the protection which the law affords the citizen is renounced.²

But when an agreement contains a condition which provides that disputes arising out of it shall be referred to arbitration, the validity of such a condition depends upon rather a fine distinction. Where the *amount of damage sustained by a breach* of the agreement is to be ascertained by specified arbitration before any right of action arises, the condition is good;³ but where all matters in dispute, of whatever sort, are to be referred to arbitrators and to them alone, the condition is illegal.⁴ The one imposes a *condition precedent* to a right of action accruing, the other endeavors to *prevent* any right of action accruing at all.

“If a tenant covenant that he will cultivate the demised land in a husband-like manner and also covenants that if any dispute shall arise in respect thereof it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them.”⁵

¹ 9 Cyc. 512, 13 C. J. 457.

² Delaware Canal Coal Co. v. Penn. Coal Co., 50 N. Y. 258.

³ Smith v. Briggs, 3 Denio, 73; Hamilton v. Ins. Co., 137 U. S. 370; Holmès v. Ricket, 56 Cal. 307, 38 Am. Rep. 54; Hood v. Hartshorn, 100 Mass. 119, 1 Am. Rep. 89.

⁴ Cases cited in first note to this section.

⁵ Tredwen v. Holman, 10 Week. Rep. 652, 1 H. & C. 72.

The principle is frequently applied in the United States to contracts for the construction of buildings, railroads, canals and other works involving numerous details. These give arise to many questions which a court of law might reasonably send to a referee, and the parties may agree that such questions shall be determined by an architect or engineer or by arbitrators, and that such determination, or a *bona fide* effort to obtain it, shall be a *condition precedent* to the right to bring an action.⁶ Policies of insurance usually contain similar clauses.⁷

But the award or determination must be a *condition precedent* to the right of action on the contract, or the agreement to arbitrate will be of no effect.⁸

“If two persons, whether in the same or in a different deed from that which creates the liability, agree to refer the matter upon which the liability arises to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then the cause of action does not arise until the third person has so assessed the sum.”⁹

§ 317. *Agreements Against Good Morals.*

Contracts of immoral tendency or on an immoral consideration are illegal and void;¹ as for example agreements to

⁶ Delaware Canal Co. v. Penn. Coal Co., 50 N. Y. 250; Smith v. R. Co., 36 N. H. 458; Reed v. Ins. Co., 138 Mass. 572; Hurst v. Litchfield, 39 N. Y. 377.

⁷ Hamilton v. Ins. Co., 136 U. S. 242; Niagara Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102; Scott v. Avery, 5 H. L. Cas. 811; Braunstein v. Ins. Co., 1 B. & S. 782, 31 L. J. Q. B. 17.

⁸ Mentz v. Ins. Co., 79 Pa. St. 480; Phoenix Ins. Co. v. Badger, 53 Wis. 288; Reed v. Ins. Co., 138 Mass. 572; Allegre v. Ins. Co., 6 H. & J. 408, 14 Am. Dec. 289; Wynkoop v. Ins. Co., 91 N. Y. 473, 43 Am. Rep. 686.

⁹ Elliott v. Assur. Co., L. R. 2 Exch. 237; Gauche v. Ins. Co., 4 Woods, 102, 10 Fed. Rep. 347.

¹ 13 C. J., § 401.

publish or sell immoral literature," agreements in derogation of the Christian religion,³ agreements in violation of public decency,⁴ agreements encouraging children to disobey parental authority.⁵

In an English case a man had told a printseller to send him "all the caricature prints that had ever been published." He accordingly sent a large quantity, but the other refused to receive them, on the ground that the collection contained several prints of obscene and immoral subjects.

"For prints," said Lawrence, J., "whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the plaintiff might have been rendered criminally answerable for a libel." ⁶

But a lower standard of morality than that of the best citizens will not avoid the agreement.⁷ While a contract employing an attorney is not void as against public policy from the fact that it was solicited by him,⁸ yet as said in a later case in the same State,⁹ "there is a very wide difference between the unprofessional and undignified practice of personal solicitation of business and the indefensible and vicious practice of employing agents and runners who are not lawyers to go about the country soliciting business and stirring up

² *Id.*

³ As the renting of a hall for a lecture aspersing Jesus Christ. *Cowan v. Milbourne*, L. R. 2 Ex. 230.

⁴ 13 C. J., § 401.

⁵ *Woodhouse v. Shepley*, 2 Atk. 535; *Mercier v. Mercier*, 50 Ga. 546.

⁶ *Foxes v. Johnes*, 4 Esp. 96.

⁷ *Moore v. Remington*, 34 Barb. 427; *Baumeister v. Markham*, 101 Ky. 122, 39 S. W. 844, 41 *Id.* 816.

⁸ *Chreste v. R. Co.*, 167 Ky. 75, 180 S. W. 49.

⁹ *Chreste v. Com.*, 171 Ky. 77, 186 S. W. 919.

strife and litigation. Practices like this should not be tolerated by officers of the court."¹⁰

The kind of immorality with which courts of law have generally dealt on the ground of public policy is sexual immorality, for the reason that other forms of immorality are in breach of definite rules of the common law. Thus a libel may be a criminal offense, so is the publication of immoral literature, but neither seduction nor living in adultery, nor fornication was taken notice of by the criminal side of the common law courts.¹¹ As being against good morals, agreements like the following have been held void: to board a bastard child and its mother, the father to be allowed to continue the illicit intercourse;¹² to furnish goods to a prostitute to assist her in her trade;¹³ to pay money or make a gift to or marry a woman, in consideration of future sexual intercourse;¹⁴ to maintain a house of prostitution.¹⁵ So of a con-

¹⁰ See note in L. R. A. 1917 B, 1128. A provision in a life insurance policy against liability for death while in the military service of the United States is not against public policy. *Miller v. Illinois Bankers*, 212 S. W. 310 (Ark.). It was unsuccessfully argued in this case that it held out an inducement to the insured not to enlist in his country's service and was an agreement on his part not to enlist and to evade the draft law. In England a condition divesting the interest of a devisee or legatee if he enters into the naval or military services of the country is void as against public policy, *re Beard*, 1 Ch. 383 (1908).

¹¹ Nor was private drunkenness an offense at common law. Therefore it is said (Pollock Contr. 261): "Probably drunkenness would be on the same footing. It is conceived, for example, that a sale of intoxicating liquor to a man who then and there avowed his intention of making himself or others drunk with it, would be void at common law."

¹² *Trovinger v. McBurney*, 5 Cow. 253.

¹³ *Pearce v. Brooks*, L. R. 1 Ex. 213.

¹⁴ *Hanks v. Naglee*, 54 Cal. 51, 35 Am. Rep. 67; *Steinfeld v. Levy*, 16 Abb. Pr. (N. S.) 26; *Brown v. Tuttle*, 80 Me. 162; *Boigneres v. Boulon*, 54 Cal. 146. See *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275.

¹⁵ *Reed v. Brewer*, 36 S. W. Rep. 99 (Tex.); *Holmbee v. Maddox*, 2 Cranch C. C. 161.

tract to marry the fact that one of the parties is already married being known to both of them.¹⁶

A promise made in consideration of past illicit cohabitation was not regarded by the English courts as made on an illegal consideration, but as a mere gratuitous promise, binding if made under seal but void if made by parol.¹⁷ This distinction which is founded on correct legal principles has been followed in some of our courts,¹⁸ while in others on mere sentimental grounds, it has been held that a parol promise to pay money in consideration of, and after seduction, and as a compensation for the injury sustained by it, is founded upon a valid consideration.¹⁹

§ 318. *Agreements in Restraint of Marriage.*

Agreements in so far as they restrain the freedom of marriage are discouraged, as injurious to the increase of the population and the moral welfare of the citizen.¹ A promise not to marry at all is void; and so is a promise to marry no one but the promisee on penalty of paying her a certain sum of money, as there is no promise of marriage on either side, and the agreement is purely restrictive.² So is an agreement to pay a sum of money to another on condition that the payee did not marry within a certain time, and then

¹⁶ *Smith v. McPherson*, 167 Pac. 875, and see note in L. R. A. 1918, B. 68.

¹⁷ *Beaumont v. Reeve*, 8 Q. B. 483.

¹⁸ *Brown v. Kinsey*, 81 N. C. 245; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Wyant v. Leshner*, 23 Pa. St. 338. See *Smith v. DuBose*, 78 Ga. 416, 6 Am. St. Rep. 260. A promise by a man who had carried on illicit relations with a married woman who threatened him with prosecution that he would make a will in her and her child's favor was held void in *Drennen v. Douglass*, 102 Ill. 341, 40 Am. Rep. 595.

¹⁹ *Smith v. Richards*, 29 Conn. 232; *Hotchkiss v. Hodge*, 38 Barb. 117; *Shenk v. Mingle*, 13 S. & R. 28.

¹ *Conrad v. Williams*, 6 Hill, 444; *Mandelbaum v. McDonald*, 29 Mich. 78; *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586; *Maddox v. Maddox*, 11 Gratt. 804.

² *Lowe v. Peers*, 4 Burr, 2225; *Conrad v. Williams*, 6 Hill 444.

a certain sum per day during the time he remained unmarried.³ An agreement by A, to give property to B, in consideration of B's living with and taking care of him is not void because A also promises not to marry until the death of B.⁴

§ 319. *Marriage Brokage Contracts.*

Marriage brokage contracts, *i. e.*, promises made upon the consideration of procuring or bringing about a marriage are illegal.¹ The civil law allowed matchmakers to receive compensation for their services, its policy appearing to be that all aid rendered in encouraging and establishing marriage was for the good of the nation and productive of public morality, inasmuch as it discouraged fornication, adultery and concubinage; but the common law looks at it in a different light, and considers that the effect of such agencies is to encourage influences of a pernicious nature by promoting

³ *Hartley v. Rice*, 10 East, 22; *Chalfant v. Payton*, *supra*. *White v. Equitable Benefit Union*, 76 Ala. 251, 52 Am. Rep. 325. A contract to pay a certain sum of money to A on his marriage with B, on condition that A shall give the promisor "the exclusive right to carry the marriage benefit insurance" on A and B, is void. *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151. Conditions restraining marriage in gifts and wills are void if the restraint is unreasonable, but valid if the restraint is not absolute, but reasonable in respect to time, place, or person. *Pomeroy's Eq. Jur.*, § 933; *Scott v. Tyler*, 2 Dick. 712. A condition not to marry under the age of twenty-eight, *Young v. Fruze*, 8 De Gex, M. & G. 756, or without the consent of parent or guardian, *Clark v. Parker*, 19 Ves. 1; *Scott v. Tyler*, 2 Brown Ch. 431; *Collier v. Slaughter*, 20 Ala. 263; or not to marry a particular person, *Scott v. Tyler*, 2 Brown Ch. 431; or an absolute restriction upon the second marriage of a man or woman have all been held valid. *Newton v. Marsden*, 2 Johns. & H. 356; *Allen v. Jackson*, L. R. 1 Ch. Div. 399; *Phillips v. Medberry*, 7 Conn. 568; *Collier v. Slaughter*, 20 Ala. 263; *Herd v. Catron*, 37 S. W. 551. A contract by which a husband agrees to pay his divorced wife \$45 a month for her support "for so long a time as she does not marry again" is not illegal. *Jones v. Jones*, 27 Pac. 85. See 35 Cent. L. J. 385.

⁴ *Fletcher v. Osborn*, 282 Ill. 143, 118 N. E. 446.

¹ *Crawford v. Russell*, 62 Barb. 92; *Weeks v. Hill*, 38 N. H. 204; *Johnson v. Hunt*, 81 Ky. 321; *Duval v. Wellman*, 124 N. Y. 156; *Morrison v. Rodgers*, 46 Pac. 1072 (Cal.)

many unhappy marriages, causing the loss of the influence of parents over their children, and holding out false and seductive hopes, by the self-interest of brokerage agents.

§ 320. *Agreements to Facilitate Divorce.*

Agreements between husband and wife to facilitate a divorce between them though prohibited by statute in some of the States¹ are, independent of statute, illegal on grounds of public policy which will not suffer husband and wife to dissolve of their own accord a contract which is in its nature indissoluble except so far as the legislative will has allowed it, and then only by the method authorized. An agreement which binds one party to pay money or transfer property in consideration that the other agrees to withdraw his or her opposition to divorce proceedings is void as against the policy of the law.² The same is true of an agreement that the husband will pay the wife money if she will not move for a new trial,³ or where the divorce has been wrongfully granted, that the parties will not disturb it,⁴ an agreement not to sue or make claim for alimony⁵ or a promise by a married man to marry a woman when he has obtained a divorce from his wife.⁶

§ 321. *Agreements for Separation.*

By the early common law every agreement for the separa-

¹ See Lawson Rights, Rem. and Pr., § 792.

² Hamilton v. Hamilton, 89 Ill. 349; Cross v. Cross, 58 N. H. 361; Comstock v. Adams, 23 Kan. 513; Muckenburt v. Holler, 29 Ind. 139, 92 Am. Dec. 345; Sayles v. Sayles, 21 N. H. 312, 53 Am. Dec. 208.

³ Blank v. Nohl, 112 Mo. 159, 19 S. W. Rep. 65, 20 S. W. 477.

⁴ Comstock v. Adams, 23 Kan. 513, 33 Am. Rep. 191; White v. Winter, 46 App. (D. C.) 355.

⁵ Seeley's Appeal, 56 Conn. 202, 14 Atl. Rep. 291; Evans v. Evans, 93 Ky. 510, 20 S. W. 605.

⁶ Noice v. Brown, 38 N. J. (L.) 228, 20 Am. Rep. 388, 39 N. J. (L.) 133, 23 Am. Rep. 213.

tion of husband and wife was void as against the policy of the law as stated in the last section¹ and such is still the rule in many American cases.² In other cases an agreement for separation is always void when neither party has been guilty of conduct which would justify a judicial separation.³ But the modern English doctrine⁴ as well as the weight of authority in the United States⁵ is that agreements providing for separation of husband and wife are valid if made in prospect of an immediate separation, but void if such agreements provide for a possible separation in the future.

“The distinction rests on the following ground: An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still that state of things is abnormal and not to be contemplated beforehand. ‘It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate.’ Or in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves.”⁶

¹ *Wilkes v. Wilkes*, 2 Dick, 791; *St. John v. St. John*, 11 Ves. Jr. 526. See *Foote v. Nickerson*, 70 N. H. 496, 48 Atl. Rep. 1088, 54 L. R. A. 554.

² *Allen v. Allen*, 73 Conn. 54, 46 Atl. 242; *McCrocklin v. McCrocklin*, 2 B. Mon. 370; *McKenna v. Philips*, 6 Whart. 571, 37 Am. Dec. 431.

³ *Poillon v. Poillon*, 61 N. Y. (Supp.) 582; *Scherer v. Scherer*, 23 Ind. (App.) 550, 55 N. E. 494; *Shankland v. Shankland* (Ill.), 134 N. E. 67.

⁴ *McGregor v. McGregor*, 20 Q. B. D. 529; *Besant v. Wood*, 12 Ch. D. 605.

⁵ *Joyce v. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172; *Grime v. Borden*, 166 Mass. 198, 44 N. E. 216; *Duryea v. Bliven*, 122 N. Y. 567, 25 N. E. 908; *Galusha v. Galusha*, 116 N. Y. 635, 22 N. E. 1114; *Nedds v. Nedds*, 56 Kas. 507, 44 Pac. 1.

⁶ *Pollock Contr.* 269; *H. v. W.*, 3 K. & J. 38. *In re Berner* (Mich.), 187 N. W. 377.

§ 322. *Agreements in Restraint of Trade.*

Agreements in restraint of trade, regarded as absolutely void even when for a limited time or within a limited space, by the early common law,¹ are at the present day in many of the States illegal and unenforceable only when the restraint is unreasonable.²

“The unreasonableness of contracts in restraint of trade and business, is very apparent from several obvious considerations: (1) Such contracts injure the parties making them, because they diminish their means of procuring livelihoods and a competency for their families. They tempt improvident persons, for the sake of present gain, to deprive themselves of the power to make future acquisitions. And they expose such persons to imposition and oppression. (2) They tend to deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. (3) They discourage industry and enterprise, and diminish the products of ingenuity and skill. (4) They prevent competition and enhance prices. (5) They expose the public to all the evils of monopoly.”³

§ 323. *The Rules in the Earlier Cases.*

Until within the last twenty years most of the courts followed certain rules in considering what was and what was not

¹ See *Wright v. Ryder*, 36 Cal. 357, 95 Am. Dec. 186. In the earliest case, the *Dyer's case*, the action was on a bond conditioned that the defendant should not use his trade as a dyer for half a year. Such a contract would be clearly good at this day, but Hull, J., when he read the bond over flew into a passion, using some very strong language in some very strange French, to the effect that: “vous purres avec demurre sur ley que l'obligation est voide ce que le condition est encounter, common ley et per Dieu se le plaintiff fuit icy il irra al prison tanque il ust fait fine au Roy.” A recent author (*Pollock on Contr.*, 314) does not think it conclusive that the judge lost his temper as is generally assumed, and certainly the *Mon Dieu* of our day has not the meaning of its English translation.

² Contracts in restraint of trade as affected by anti-trust statutes, see note to *Baird v. Smith*, 128 Tenn. 410, 161 S. W. 492 in L. R. A. 1917, A. 379.

³ *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119.

an unreasonable restraint, and the cases up to that time will be found to fall under three heads, viz.: 1. Where the restraint was unlimited as to both time and space. 2. Where the restraint was limited as to space but unlimited as to time. 3. Where the restraint was limited as to time, but unlimited as to space. 4. Where the restraint was limited as to both time and space. In the first case the agreement was void, *e. g.*, a man could not agree that he would never be interested in any part of the United States in the business of manufacturing daguerreotype materials;¹ or that he would never engage in the manufacture of matches in the city of St. Louis or at any other place.² In the second case the agreement was valid, *e. g.*, a man could agree that he would never deal in fancy goods in Cincinnati, Ohio;³ or in agricultural implements in Richmond, Indiana;⁴ or in cabinet-ware in Buffalo, New York;⁵ or in hardware in Hillsboro, Illinois;⁶ or not to practice as physician in a city or its vicinity.⁷ In the third case the agreement was void: *e. g.*, a man could agree that he would never carry on a certain trade, business, or profession within the city of New York or a certain distance of it, but he could not promise that he would not carry it on anywhere for a certain number of years no matter how few.⁸ In the fourth

¹ Dean v. Emerson, 102 Mass. 480; Bank v. Bank (Neb.), 187 N. W. 117.

² Peltz v. Echole, 62 Mo. 171; Torcan v. Fuqua, 175 Ky. 428, 194 S. W. 359; Henschke v. Moore, 101 Atl. 388 (Pa.).

³ Thomas v. Miles' Admr., 3 Ohio St. 274.

⁴ Beard v. Dennis, 6 Ind. 200, 63 Am. Dec. 380.

⁵ Weller v. Hersee, 10 Hun. 431.

⁶ Stewart v. Challacombe, 11 Ill. App. 379.

⁷ Timmerman v. Dever, 52 Mich. 34, 17 N. W. Rep. 230, 50 Am. Rep. 240.

⁸ Agreements like the following were therefore void: That one would not carry on the business of a merchant for twenty years, Ward v. Byrne, 5 Mees. & W. 548, or of an innkeeper for ten years, Mossop v. Mason, 18 Grant (U. S.), 453; or of the manufacturing of dyes for thirty years, Saratoga Bank v. King, 44 N. Y. 87; or engage in the dry goods business for five years, Wiley v. Baumgardner, 97 Ind. 66, 49 Am. Rep. 427.

case the agreement was valid, *e. g.*, a man could agree not to engage in the livery business in Chicago for five years.⁹

§ 324. *The Modern Doctrine.*

The modern doctrine which has been adopted in many of the states and in England, rejects the fixed rules of the older decisions and makes the validity of an agreement in restraint of trade depend upon whether the restraint is such as to afford a fair protection to the interests of the party in favor of whom it is imposed; and under this doctrine it is only when the restraint is larger than the necessary protection of the party calls for without any countervailing benefit, that the agreement is void.¹ The doctrine is summed up in an English case in these words:

"All cases, when they come to be examined, seem to establish this principle; that all restraints upon trade are bad, as being in violation of public policy, unless they are natural,

State v. Country. In the earlier American cases an agreement wherein one of the parties promised not to carry on a specified business at any place within the state was void. *Wright v. Ryder*, 6 Cal. 357; *Taylor v. Blanchard*, 13 Allen, 370; *Dunlop v. Gregory*, 10 N. Y. 241. But in *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 67, a contract restraining one of the parties from running a steamboat on any of the waters of the State of California was held valid, Mr. Justice Bradley saying that as this country, though composed of a number of States, is one country in all matters of trade and business, in many cases it would be taking a narrow view of the subject to condemn as invalid a contract not to carry on a particular business, within a particular State. Later cases follow this rule: *Beal v. Chase*, 31 Mich. 490; *Diamond Metal Co. v. Roeber*, 106 N. Y. 473, 13 N. E. 419; *Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. 712.

⁹ *Hansen v. Gavin*, 162 Ill. 377, 44 N. E. 735; or the business of barber, *Bradshaw v. Millikin*, 92 S. E. 161 (N. C.); *Wyder v. Milhomme* (N. J.), 115 A. 380.

¹ *U. S. Chemical Co. v. Prov. Chemical Co.*, 64 Fed. 949; *Roussillon v. Roussillon*, 14 Ch. Div. 351; *Maxim-Nordenfeldt Gun Co. v. Nordenfeldt*, 1 Ch. 630 (1893) App. Cas. 535 (1894); *Beal v. Chase*, 31 Mich. 490; *Oregon Steam Nav. Co. v. Windsor*, 20 Wall. 67; *Diamond Metal Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 465; *Wood v. Whitehead Bros.*, 165 N. Y. 545, 59 N. E. Rep. 357; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153.

and not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is this: Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labor, skill, or talent by any contract that he enters into. On the other hand, public policy requires that when a man has by skill, or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stipulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract."²

Therefore under this rule a professional man or person engaged in legitimate business,³ on selling his good-will may bind himself not to resume practice or business within what is reasonable under all the circumstances of the case, for the protection of the purchaser.⁴

But under this doctrine it is essential that the restraint of trade be incident to or in support of a sale or conveyance in which the party has an interest which is in need of protection.⁵

² *Leather Cloth Co. v. Lorsont*, L. R. 9 Eq. 345.

³ Where a person agreed not to carry on the liquor business the contract was held valid on the ground that this business was not a trade to be encouraged. *Harrison v. Lockhart*, 25 Ind. 112. But an agreement is not illegal because it concerns the carrying on of the liquor trade. *Mitchell v. Branham*, 79 S. W. Rep. 739 (Mo.).

⁴ *McKinnon Pen Co. v. Fountain Ink Co.*, 48 N. Y. (S. C.) 442, 2 M. & W. 273; *McClurg's Appeal*, 58 Pa. St. 51; *Rakestraw v. Lanier*, 104 Ga. 188, 30 S. E. 735.

⁵ *Oliver v. Gilmore*, 52 Fed. 562; *Shapard v. Lesser*, 127 Ark. 590, 193 S. W. 262, and see note in 3 A. L. R. 250, where it is said: "Covenants in partial restraint of trade are now generally upheld where they are agreements by the seller of a business not to compete with the buyer, in such a way as to decrease the value of the business, by a retiring partner not to compete with the firm, by a

§ 325. *Other Cases of Lawful and Unlawful Restraint.*

The rule of public policy forbidding agreements in restraint of trade does not apply to the sale of a patent right, as this is a monopoly authorized by the government itself for the encouragement of invention,¹ and therefore the patentee, having the sole legal authority to make and sell the invention, may restrict its use in respect of territory, time, business, or purposes as he shall deem fit² and the same principle applies to trade-marks.³ So on the sale of a secret process of manufacture of an article, which it is agreed shall be communicated for the exclusive benefit of the buyer, it becomes a reasonable and necessary stipulation that the seller shall not communicate the secret to anyone, or carry on the manufacture in the future.⁴

Where a contract is made for the employment of a person in a certain trade or business, it may be accompanied with an absolute and unlimited restraint against this carrying on the same trade or business for another person, or in any other way, during the employment or for a reasonable time

partner not to do anything to hinder the business of the partnership, by an assistant or agent not to compete with his master or employer after the expiration of his term of service, by the buyer of property not to use it in competition with the business retained by the seller, and agreements made by the lessor of property not to use it in competition with the business of the lessee." An agreement not to engage in a particular business, in a particular place, is invalid when not connected with the sale of a good will. *Kidder Equity Exchange v. Norman*, 173 N. W. 728 (S. D.)

¹ *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223; *Brewer v. Lamar*, 69 Ga. 656, 47 Am. Rep. 766; *Billings v. Ames*, 32 Mo. 265.

² *Morse, etc., Mac. Co. v. Morse*, 103 Mass. 73; *Mackinnon Pen Co. v. Fountain Ink Co.*, 42 N. Y. (S. C.) 442; *Kinsman v. Parkhurst*, 18 How. 289, 1 Blatchf. 488.

³ *Brewer v. Lamar*, 69 Ga. 656, 47 Am. Rep. 766.

⁴ *Leather Cloth Co. v. Lorisont*, L. R. 9 (Eq.) 345; *Bryson v. Whitehead*, 1 Sim. & St. 74; *Jarvis v. Peck*, 10 Paige, 118; *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Brewer v. Lamar*, 69 Ga. 656, 47 Am. Rep. 766; *Fowler v. Park*, 131 U. S. 88; *Yode v. Gross*, 127 N. Y. 480, 28 N. E. 469.

after the term of service has elapsed;⁵ as where A agrees to write plays for B's theater and for no other,⁶ or to write for C's magazine and for no other.⁷ Where the employment is for life, the restraint may be for life.⁸ And a partner may bind himself absolutely not to compete with the firm during the partnership.⁹

Restrictions in the right to re-engage in business in agreements between employer and employe, are not viewed with the same favor as those between vendor and vendee of a business and its good will.¹⁰ Thus a contract by one employed as manager of a clothing store, not to engage in similar business for five years after leaving his employment in any city where the employer conducted a store was held unreasonable and void.¹¹ And an employer may not contract with the employe against his using his knowledge, skill and reputation, although he may as to the patrons and customers of the employer and his trade secrets.¹²

An agreement that one person will trade only with another is valid;¹³ as where a physician agreed, on selling his drug store, to send all his prescriptions to be filled by one druggist;¹⁴ where A contracted to furnish B with sewing machines at a discount, and upon credit, provided that B would deal exclusively with him;¹⁵ where a dentist agreed to purchase

⁵ *Piltington v. Scott*, 15 M. & W. 657; *Middleton v. Brown*, 47 L. J. Ch. 411. *Sternberg v. O'Brien*, 22 Atl. (N. J.) 348.

⁶ *Morris v. Coleman*, 18 Ves. 438.

⁷ *Stiff v. Cassell*, 2 Jur. (N. S.) 348.

⁸ *Wallis v. Day*, 2 M. & W. 273; *Morris v. Coleman*, 18 Ves. 438; *Stiff v. Cassell*, 2 Jur. (N. S.) 348.

⁹ *Kinsman v. Parkhurst*, 18 How. 289; *Dolph v. Troy Laundry Co.*, 28 Fed. 553.

¹⁰ See note in 9 A. L. R. 1456.

¹¹ *Samuel Stores v. Abrams*, 108 Atl. 541 (Conn.).

¹² *Hepworth Man. Co. v. Ryott*, 1 Ch. 1 (1920).

¹³ *Lightner v. Menzel*, 35 Cal. 452; *Schwalin v. Holmes*, 49 Cal. 655; *Long v. Towle*, 42 Mo. 545, 97 Am. Dec. 385; *Palmer v. Stebbins*, 3 Pick. 188, 15 Am. Dec. 204; *Brown v. Rounsavell*, 78 Ill. 589.

¹⁴ *Ward v. Hogan*, 11 Abb. N. C. 478.

¹⁵ *Brown v. Rounsavell*, 78 Ill. 589.

artificial teeth of a manufacturer on condition that the latter would not sell such teeth to any person in the town where the dentist resided;¹⁶ where a hotel-keeper contracted to buy no ice for his hotel except of a certain ice company;¹⁷ where A leased part of a warehouse for a certain term to B for the storage of wheat, agreeing that during the term he would not purchase, store or handle any wheat in the town except under the direction of B.¹⁸

Agreements with the object of permitting the manufacturer, producer or wholesale dealer to control the price when the things reach the hands of third parties, have come before the courts in recent years. Such conditions have been generally held void as against the public interest and repugnant to the absolute title conveyed,¹⁹ it being said by the Supreme Court of the United States that attempts to sell property and yet to place restraints upon its further alienation have been hateful to the law from Lord Coke's day to ours.²⁰ It does not bind them that they may have bought with notice of the condition,²¹ and the manufacturer cannot create any privity of contract between himself and persons into whose hands the goods may come, by attaching notices thereto.²²

§ 326. *Combinations Among Workmen.*

Every man has a right to work for whom he pleases and on what terms he pleases. He may refuse to deal with a particular man or class of men. It is perfectly legal for any number of persons without any unlawful object in view to

¹⁶ *Clark v. Crosby*, 37 Vt. 188.

¹⁷ *Twomey v. People's Ice Co.*, 66 Cal. 233.

¹⁸ *Kellogg v. Larkin*, 3 Chand. 133.

¹⁹ *Miles Medical Co. v. Park Sons Co.*, 220 U. S. 373.

²⁰ *Straus v. Victor Talking Machine Co.*, 243 U. S. 490.

²¹ *Garst v. Hall Co.*, 179 Mass. 588, 61 N. E. 219; *Clabaugh v. Heibner* (Mo.), 236 S. W. 396.

²² *Bobbs Merrill Co. v. Strauss*, 210 U. S. 339. See an exhaustive note on the subject in 7 A. L. R. 449-493.

agree that they will not work for or deal with certain persons or under a fixed price or without certain conditions.¹ The test is the legality of the intent. Thus a combination of workmen for the purpose of obtaining reasonable prices for their labor is not illegal.² But of a different nature is a conspiracy to obtain money from an employer by inducing his workmen to leave him and deterring others from working for him; and any association, in short, designed to coerce workmen to become members or to dictate terms to employers on which their business shall be conducted, by means of threats of loss, interference with their property, traffic or lawful employment of other persons, is *pro tanto*, an illegal combination.³ An agreement between a brewers' association and a labor union, providing that no employe of the former should be allowed to work for more than four weeks without becoming a member of the latter, has been held void as against public policy.⁴

§ 327. *Combinations Among Employers and Traders.*

Agreements between employers or traders whose effect is to restrain the freedom of trade or the free employment of labor are illegal and void.¹ As for example: An agreement

¹ *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Boston Glass Co. v. Binney*, 4 Pick. 425; *Bowen v. Matheson*, 14 Allen, 499. This subject lies more properly in the criminal law—the law of conspiracy. For a learned discussion of the law as to conspiracies to control wages of workmen, see *People v. Fisher*, 14 Wend. 9; and note in 28 Am. Dec. 507; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 346.

² *Sayre v. Ben. Assn.*, 1 Duv. 143, 85 Am. Dec. 613; and see *Bowen v. Matheson*, 14 Allen, 503; *Snow v. Wheeler*, 113 Mass. 185.

³ *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48.

⁴ *Curran v. Galen*, 46 N. E. Rep. 297 (N. Y.).

¹ *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Morris Run Coal Co. v. Barclay*, 68 Pa. St. 173, 8 Am. Rep. 159; *Arnott v. Coal Co.*, 68 N. Y. 558, 23 Am. Rep. 190; *Wiggins Ferry Co. v. R. R. Co.*, 5 Mo. (App.) 347; *Stewart v. R. R. Co.*, 38 N. J. (L.) 505; *People v. Milk Exchange*, 39 N. E. 1062 (N. Y.).

between the members of an association of salt manufacturers that no members should sell any salt during the life of the association except at retail at the factory and at prices fixed by a committee;² an agreement between two coal-mining companies that one would take all the coal the other should mine and the other should not sell to any third parties;³ an agreement by several commercial firms by which they bound themselves for the term of three months not to sell any India cotton bagging, except with the consent of the majority of them;⁴ an agreement between the grain dealers of a town which purported to be a contract of partnership for the purpose of dealing in grain, but the real object of which was to form a secret combination to control the grain trade and suppress competition;⁵ an agreement between members of a stenographers' association that they would work only at certain fixed rates, except in competition with persons not members of the association.⁶

§ 328. *Where Public Interests Affected.*

In many of the modern instances of unlawful combinations, the reasonableness of the restraint as between the parties is not the only thing to be looked to. Wherever the party is exercising a public franchise or is engaged in a business imposed with a public trust, the question is not whether the agreement is fair and reasonable as between the parties, but whether the public interests are in any wise injuriously affected. This is the case where railroad companies or gas

² Cent. Ohio Salt Co. v. Guthrie, 35 Ohio St. 666.

³ Arnott v. Coal Co., 68 N. Y. 558, 23 Am. Rep. 190.

⁴ India Assn. v. Kock, 14 La. Ann. 168.

⁵ Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171.

⁶ Moore v. Bennett, 34 Cent. L. J. 304.

companies or other quasi-public corporations are the contracting parties.¹

On this ground agreements made by common carriers of goods and passengers, by telegraph companies and innkeepers exempting them from liability for losses caused by their default or negligence are in nearly all of the States declared to be void.²

§ 329. *Agreements Affecting Duties Towards Third Persons.*

It has been suggested¹ that agreements which tend to discourage moral duties towards third persons are void as against public policy, as for example a covenant by a landowner to let all his cultivated land lie waste, or a clause in a charter party prohibiting deviation even to save life. A promise of money to a private citizen if he will abandon a proceeding he had begun to establish a public highway is void.² So is a bond given to a sheriff to indemnify him for omitting to do his duty,³ or to a trustee to indemnify him for a contemplated breach of trust.⁴

A contract between a merchant and one who was to sell him articles to be used in a voting contest to stimulate trade, under which the latter was to distribute fictitious votes among the contestants is void because a fraud on them.⁵ A condition in a deed forbidding its sale to a negro,⁶ or its occupation by

¹ Gwynn v. Citizens Tel. Co., 48 S. E. Rep. 460 (S. C.) citing 9 Cyc. 534; Gibbs v. Gas Co., 130 U. S. 396; Texas & R. Co. v. R. Co., 41 La. Ann. 970, 6 South. 888; Pull. Pal. Car Co. v. R. Co., 4 Woods, 317; West. Union Tel. Co. v. Am. Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; West Va. Trans. Co. v. Ohio Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527.

² See Lawson Bail. §§ 81, 137, 245, 319.

³ Pollock Contr. 306, citing Cockburn, C. J., in 5 C. P. D. 305.

⁴ Jacob v. Tobiason, 65 Iowa, 245.

⁵ Hampton v. Crawford, 38 S. W. Rep. 80 (Mo.).

⁶ Moss v. Cohen, 32 N. Y. (Supp.) 1078.

⁵ American Manf. Co. v. Crescent Drug Co., 73 South. 883 (Miss.).

⁶ Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 South. 641.

a person other than of the Caucasian race⁷ is not against public policy, nor is an agreement to remove from a city and remain away for a certain time or as long as the other party resides there.⁸

An illustration of agreements invalid because they tend towards the omission of a legal duty towards individuals is found in those by which a father deprives himself of the right to the custody of his children.⁹ Such an agreement may be revoked by him at any time, and if the other party refuses to deliver the child he may obtain possession by habeas corpus,¹⁰ unless in the opinion of the court, it would be greatly to the benefit of the child, on account of the character, or means of support of the father, that it should remain in the custody of the person to whom he committed it.¹¹ The principle running through all the cases is that the custody of children cannot be made a mere matter of bargain, and that the parent:

“Cannot bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children and not for his own.”¹²

An agreement by a servant with his master to waive all damages for injuries resulting from the negligence of the latter is void as against public policy.¹³ For, as in the case of

⁷ *Los Angeles Invest. Co. v. Gary*, 186 Pac. 596 (Cal.).

⁸ *Wallace v. McPherson*, 197 S. W. 565 (Tenn.); *Upton v. Henderson*, 106 L. T. N. S. 839.

⁹ *Re Scarritt*, 76 Mo. 565, 43 Am. Rev. 768.

¹⁰ *Regina v. Smith*, 16 Eng. L. & Eq. 221; *State v. Baldwin*, 5 N. J. (Eq.) 454, 45 Am. Dec. 399; *Brooke v. Logan*, 112 Ind. 183, 2 Am. St. Rep. 177; *Hussey v. Whiting*, 145 Ind. 580, 44 N. E. Rep. 639; *State v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223.

¹¹ *Verser v. Ford*, 37 Ark. 27; *Bentley v. Terry*, 59 Ga. 555, 27 Am. Rep. 397; *Enders v. Enders*, 164 Pa. St. 266, 30 Atl. 129.

¹² *Andrews v. Salt*, L. R. 8 Ch. 622.

¹³ *Cook v. R. R. Co.*, 72 Ga. 48; *Kansas Pacific R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Lake Shore, etc., R. Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467; *Blanton v. Dodd*, 109 Mo. 64, 18 S. W. Rep. 1149; *Tarbell v. R. Co.*, 73 Vt. 347, 51 Atl. 6; *Pittsburg R. Co. v. Kinney*, 115 N. E. 505 (Ohio); and see note in L. R. A. 1917 (1) 648; *Johnston v. Fargo*, 184 N. Y. 379.

the carrier of passengers, the law will not permit an agreement whose tendency (by removing one of the restraints against negligence and want of care, viz.: the liability to pay damages in a court of law) is to render a person or corporation less careful of the safety of individuals or of the public.

(d)

EFFECT OF ILLEGALITY.

§ 330. *Illegal Agreement Void.*

An illegal agreement being void can give no rights to the parties to it—neither a court of law nor equity will aid either of them, but will, as it is often said, leave them where it finds them.¹ The reason is thus stated in an early case:

“The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law, there the court says he has no right to be assisted.”²

An agreement in which no illegality appears, and of which neither the consideration nor the promise in itself imports any illegality, may, nevertheless, be made for an illegal purpose, and the agreement, though unobjectionable in its terms, may then be rendered void by the illegality of the purpose for

¹ 9 Cyc. 546; 13 C. J. 493; *Glass v. Basin Mining Co.*, 77 Pac. Rep. 302 (Mont.); *R. Co. v. Smelting Co.*, 269 Fed. 898.

² *Holman v. Johnson*, 1 Corp. 341.

which it is made. And for the proving of the real purpose oral evidence is always admissible, even though the contract be under seal.³

§ 331. *Exceptions.*

The exceptions which we have seen¹ to the rule that money paid or property delivered under an illegal agreement cannot be recovered back apply likewise to the action to enforce the agreement—where the parties are not *in pari delicto*, where the law was intended for the special protection of the party seeking relief, and where the illegal purpose has not been consummated.

§ 332. *Circumstances Affecting Question of Illegality.*

The effect of illegality upon the validity of the agreement in which the illegality appears may vary according to circumstances. For:

(a) The illegality may affect the whole, or only a part of the agreement, and the legal and illegal parts may or may not be capable of separation.

(b) The direct object of the agreement may be the doing of an illegal act, or the direct object may be innocent though designed to further an illegal purpose.

(c) The parties may both be ignorant, or both be aware of the illegality which remotely or directly affects the transaction; or one may be innocent of the objects intended by the other.

(d) The agreement may be legal where it was made and illegal where it is to be performed, or *vice versa*, or it may be legal or illegal as the case may be in the jurisdiction where it is sought to be enforced.

³ See Post, chap. X.

¹ Ante, chap. II.

(e) The law may have been changed between the time of its making and the time of its performance or enforcement.

§ 333. *Consideration or Promise Wholly Illegal.*

If the whole consideration or the whole promise is illegal the agreement is void; if it is executed the courts will not interfere, while if the contract is executory they will lend no aid to either party to enforce it.¹

§ 334. *Consideration Legal but Promise Partly Illegal.*

A lawful promise made for a lawful consideration is not invalid simply by reason of an unlawful promise being made at the same time for the same consideration.¹

“If some of the covenants of an indenture or of the conditions indorsed upon a bond are against law, and some good and lawful, in this case the covenants or conditions which are against law are void *ab initio* and the others stand good.”²

Thus where the contract was that A would not engage in the manufacture of matches “in the city of St. Louis or at any other place,” it was held that though the covenant not to manufacture anywhere was void, yet the covenant not to manufacture in St. Louis being legal would be binding.³

In the early history of the common law the judges, fearing that statutes might be eluded, laid it down that a “statute is like a tyrant, where he comes he makes all void, but the common law is like a nursing father, making only void that part where the fault is and preserves the rest.”⁴ This distinc-

¹ Ante, § 330.

¹ 9 Cyc. 565. A distinction has been made in a few cases between what is *malum prohibitum* and *malum in se*, under which it is held that any stipulation to perform an immoral act will render the contract void in toto. *Bierbauer v. Wirth*, 10 Biss. 69.

² *Pigot's Case*, Coke Rep. 26.

³ *Peltz v. Echole*, 62 Mo. 171; *Smith's Appeal*, 113 Pa. St. 579.

⁴ *Pollock on Contr.* 321, *Anson Contr.* 190.

tion is, however, not now regarded,⁵ and if in part of an agreement is contrary to statute, this does not avoid or annul other parts which are separable from the bad part, and not founded upon it, unless the statute expressly or by necessary implication declares the whole void.⁶

§ 335. *Consideration Partly Illegal.*

If any part of a single consideration for one or more promises is illegal or if there are several considerations for one promise, some of which are legal and some illegal, the promise is void, for it is impossible to say whether the legal or illegal portion of the consideration most affected the mind of the promisor and induced his promise.¹ This rule does not extend to a consideration which is merely void but not illegal,² for where the consideration in a contract consists of

⁵ U. S. v. Bradley, 10 Pet. 343; Hynds v. Hays, 25 Ind. 31; State v. Findley, 10 Ohio 51; Pickering v. R. Co., L. R. 3 C. P. 350.

⁶ Rand v. Mather, 11 Cush. 1, 59 Am. Dec. 131.

¹ 9 Cyc. 566; 13 C. J. 513.

² This distinction is well stated in King v. King, 63 Ohio St. 363, where A agreed with B that she would not marry during his life, but would live with and take care of him. In consideration of this he promised to provide for her liberally. Though the promise not to marry was illegal the Court allowed a recovery, saying: "If one of two considerations is void merely for insufficiency, and not for illegality, the other will support the contract. . . . A void contract is one which has no legal force, and which, for that reason, cannot be enforced; an unlawful contract is one to do an act which the law forbids, or to omit an act which the law enjoins, and for that reason is non-enforceable. There is no provision, either by statute or at common law, which enjoins on any particular person the duty to marry, nor can anyone be punished for not marrying. To marry, or not to marry, is left to the free choice of all who are eligible to marriage. Hence to omit to marry is not illegal, though the promise to omit is one which the law will not enforce. It would appear naturally to follow that the only result of making such a promise would simply be that no legal right could be founded on the promise and no remedy afforded for its breach. It is difficult to see any good reason for denouncing such contract as illegal in the sense of violating any law, or of placing parties who may have entered into it outside of the pale of the law."

several matters and is partly void, if any valid consideration remains, it is, in general, sufficient to support the promise; as where part of the stated consideration is impossible or unintelligible, or immaterial, it may be rejected, and the promise supported by that which is valid.³

In a leading case⁴ A sued B for three months' wages. It appeared that A had been employed by B who kept a billiard room to do work for him in the room and bar, and A showed that he opened the place, made the fires, took care of the tables and waited on customers at the bar. It appeared also that the sale of liquors in the place was illegal. The court held that A could recover nothing, saying:

"There is room for but one conclusion, namely, that the agreement was that the plaintiff, at the defendants' request, should perform all the services which he did in fact perform, and that the defendants, in consideration of the promise to perform (and the performance of) all those services, the illegal as well as the legal, should pay the plaintiff the reasonable worth or the entire services. In other words, the plaintiff made an entire promise to perform both classes of services; this entire promise (and the performance thereof) formed an entire consideration for the defendants' promise to pay; and a part of this indivisible consideration was illegal. . . . If the plaintiff had performed a class of services for each of which it is customary to pay a separate price, the nature of the various services so performed might afford ground for the conclusion that the parties contemplated a separate payment for each service rendered. But it is not contended that it is customary to pay saloon-tenders separate prices for sweeping, for building fires, for acting as billiard markers, and for selling liquor."

The same conclusion was reached in two recent cases, in one where the plaintiff was employed to manage the advertisements of the daily, weekly, and Sunday editions of a news-

³ Shackwell v. Rosier, 2 Bing. (N. C.) 646; Jarvis v. Peck, 1 Hoff, Ch. 479; Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Delafant v. Shapiro (Pa.), 73 Pa. Sup. 186.

⁴ Bixby v. Moor, 51 N. H. 402.

paper, and it was held that the contract being void as to the Sunday edition, the illegality tainted the whole and he could not recover anything for his services on the weekly or daily edition;⁵ in the other where a person agreed to give seven public concerts for a certain sum, six on week days and one on Sunday afternoon, when Sunday concerts were prohibited by statute, it was held that there could be no recovery at all on the agreement.⁶

Thus while, as we have seen, where A promised in consideration of B's paying him a certain sum of money that he would never manufacture matches in St. Louis or elsewhere, though the promise to manufacture nowhere was void, yet the promise not to manufacture in St. Louis was valid and would be enforced; yet had B been the plaintiff and had sued A for the money he could have recovered nothing.⁷ Like the case of the statute of frauds where if the defendant in the action has signed the memorandum, the agreement is enforceable even though had the defendant been the plaintiff he could not have recovered on the agreement, the question depends on who is the plaintiff—for if the promise sued on is valid, it may be enforced even although another void promise was made on the same legal consideration while if the consideration is partly illegal the promise is altogether void.

§ 336. *Promises and Considerations Severable.*

Where there are several promises based on several considerations, the fact that one or more of these considerations is illegal will not avoid all the promises, if those which were made upon legal considerations are severable from the others.¹

⁵ Handy v. St. Paul Globe Co., 41 Minn. 188, 42 N. W. Rep. 872; Leverett v. Garland Co. (Ala.), 90 S. 343.

⁶ Stewart v. Thayer, 168 Mass. 519, 47 N. E. Rep. 420.

⁷ Bishop v. Palmer, 146 Mass. 467.

¹ Shackwell v. Rosier, 2 Bing. (N. C.) 634; Jarvis v. Peck, 1 Hoff, Ch. 479; Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Carleton v. Woods, 28 N. H. 290; Leverett v. Garland Co. (Ala.), 90 S. 343.

Thus if A buys from a druggist a brush for \$1, a bottle of perfume for \$2, and a quart of whiskey for \$1, and the sale of the whiskey was illegal, the druggist could still recover the \$3 for the other articles²—though if A's promise had been to pay \$6 for the three articles he could recover nothing. Therefore where a note is given in payment of an account, some of the items of which are legal and some illegal, the note itself is entirely void, and the holder cannot recover on the note even to the extent of the lawful items.³

§ 337. *The Unlawful Intention.*

Where the direct object of the parties is to do an illegal act the agreement is void, and it does not matter whether or not they knew that the object was illegal, for ignorance of the law excuses no one.¹ And where the object or consideration is not illegal, but the illegality consists in the intention of one or both of the parties to further an illegal purpose, then if this unlawful intention is at the time common to both parties the agreement is void.²

“Where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance.”³

² Boyd v. Eaton, 44 Me. 51, 69 Am. Dec. 83; Carleton v. Woods, 28 N. H. 290.

³ Widoe v. Webb, 20 Ohio St. 431; Cotten v. McKenzie, 57 Miss. 418; Pacific Guano Co. v. Mullen, 66 Ala. 582. The contrary was decided in Shaw v. Carpenter, 54 Vt. 155, and Hynds v. Hays, 25 Ind. 31.

¹ Pollock Contr. 322; Anson Contr. 192; Favor v. Philbrick, 7 N. H. 326; Stewart v. Theyer, 168 Mass. 519, 49 N. E. 426.

² Post, § 338.

³ Waugh v. Morris, L. R. 8 Q. B. 202; Sheffield v. Balmer, 52 Mo. 474, 14 Am. Rep. 430.

But where one of two parties intends a contract, innocent in itself, to further an illegal purpose, and the other enters into it in ignorance of his intention, the innocent party may, while the agreement is still executory, avoid it at his option.⁴ A sued B for breach of an agreement to let him certain rooms. A intended to use the rooms for the purpose of delivering lectures which were unlawful, as being blasphemous within the meaning of a statute. B was not aware of the use to which A meant to put the rooms at the time the agreement was made; and he subsequently refused to allow him to use them. It was held that he was entitled to treat the agreement as void.⁵

So where the intention of one of the parties is lawful and the agreement is capable of being executed in a lawful manner, he is entitled to full benefits under it, whatever may have been the secret intention of the other party.⁶

“It must be observed, however, that it would not always be enough to avoid a contract for a sale of articles innocent of themselves that the party who acquired them, or sought to acquire them, occasionally used them unlawfully. In order that this doctrine should operate in avoidance of a contract, except where the illegality involves life, or offenses of the higher grade, it must appear that the party acquiring the product intended to use it unlawfully when the contract was made, or when possession was sought, or that he was engaged in a general scheme involving illegality, or the general pur-

⁴ *Church v. Proctor*, 66 Fed. Rep. 210.

⁵ *Cowan v. Milbourn*, L. R. 2 Ex. 230. But see *Sprague v. Rooney*, 82 Mo. 493, 52 Am. Rep. 383. When one has gone into possession under a lease the lessor's remedy in case the lessee uses the premises for a bawdy house is under the statute against disorderly persons. *O'Brien v. Brietenbach*, 1 Hilt, 394. Summary proceedings to eject the tenant where he uses the premises for an illegal purpose is provided for in various states. See *Prescott v. Kyle*, 103 Mass. 381; *Justice v. Lowe*, 26 Ohio St. 370; *McGarvey v. Prickett*, 27 Ohio St. 669.

⁶ *Pixley v. Boynton*, 79 Ill. 351; *Quirk v. Thomas*, 6 Mich. 76; *Williams v. Tiedeman*, 6 Mo. (App.) 269.

pose was to use the product in a deceptive and fraudulent manner.”⁷

§ 338. *Knowledge of Illegal Intention—The English Rule.*

We see then that where the direct object of the agreement is illegal, it is void, and where an agreement innocent in itself is intended by one of the parties to further an illegal purpose, the courts will not enforce it in his favor. But whether the courts will enforce it in favor of the other party to the agreement when it is found that he knew of the illegal design, is a question on which there is a difference of opinion. Since the case of *Pearce v. Brooks*,¹ the English rule may be stated thus:

“It is not necessary that parties to a contract *prima facie* innocent should bind themselves to adapt it to an illegal purpose in order to avoid it. It is enough that the one party knows the unlawful intent of the other and that the contract is intended to be applied by the latter to its illegal purpose.”

In *Pearce v. Brooks*,² an action was brought by coach builders to recover payment for the hire of a carriage engaged by a prostitute. It was proved that the plaintiffs knew that the defendant was a prostitute, and that they knew (as the jury found) that she intended to use it in her trade. The court held that they could not recover, on the ground that a person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose cannot recover for the thing so supplied.

⁷ *Church v. Proctor*, 66 Fed. Rep. 210.

¹ *Cannon v. Bryce*, 3 B. & Ald. 179. So money lent by one to another knowing that he intends to use it for an illegal purpose, as, for example, gambling, cannot be recovered by the lender. *Cannon v. Bryce*, *supra*.

² L. R. 1 Ex. 213.

§ 339. *The American Rule.*

The American doctrine is in conflict with *Pearce v. Brooks*, and agrees substantially with the remarks of Bramwell, B., in that case:

“My difficulty was whether though the defendant hired the brougham for that purpose, it could be said that the plaintiffs let it for the same purpose. In one sense it was not for the same purpose. If a man were to ask for dueling pistols, and to say, ‘I think I shall fight a duel tomorrow,’ might not the seller answer, ‘I do not want to know your purpose; I have nothing to do with it; that is your business; mine is to sell the pistols, and I look only to the profit of trade.’ No doubt the act would be immoral, but I have felt a doubt whether it would be illegal; and I should feel it still but that the authority of previous cases concludes the matter.”

Though there is some conflict in the decisions,¹ the weight of authority in the United States sustains this view and lays it down that the mere knowledge of a vendor of property that the vendee intends to make an illegal use of it, is no defense to an action for the price.² Therefore, it is no defense to an action for goods sold and delivered, that the plaintiff knew that the defendant was a prostitute, and that they were intended to be used by her in her trade;³ or to an action on a contract for the purchase of a house that the vendor knew that the vendee intended it for his mistress;⁴ or to an action

¹ See *Adams v. Coulliard*, 102 Mass. 167; *Sherman v. Wilder*, 106 Mass. 537; *Riley v. Jordan*, 122 Mass. 231; *Wilson v. Stratton*, 47 Me. 120; *McConike v. McMann*, 27 Vt. 95.

² *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Hannauer v. Doane*, 12 Wall. 342, 349; *Gambs v. Sutherland*, 101 Mich. 355, 59 N. W. 652; *Rose v. Mitchell*, 6 Col. 103, 45 Am. Rep. 570; *Hedges v. Wallace*, 2 Bush, 442, 92 Am. Dec. 497.

³ *Hubbard v. Moore*, 24 La. Ann. 591, 13 Am. Rep. 128; *Anheuser-Busch Brew. Assn. v. Mason*, 44 Minn. 318, 20 Am. St. Rep. 580; *Hollenburg Music Co. v. Berry*, 85 Ark. 9, 106 S. W. 1172; *Wash. Liquor Co. v. Shaw*, 38 Wash. 398, 80 Pac. 536; *Loose v. Larsen*, 161 Pac. 514 (Neb.); *Fineman v. Faulkner*, 93 S. E. 384 (N. C.) sale of phonograph.

⁴ *Armfield v. Tate*, 7 Ired. 258.

for rent that the lessor knew that the lessee intended to use the premises for an unlawful purpose;⁵ or to an action for money lent, that the plaintiff knew that the money was to be used in gambling or for some other illegal purpose;⁶ or to an action for goods sold and delivered, that the vendor knew that the purchaser bought them to resell them in a State where the sale of such goods was unlawful.⁷

In *Michael v. Bacon*,⁸ in an action for work, labor and materials in papering and fitting up a house in St. Louis, the defense was that the defendants intended to use the house when fitted up as a gambling house and that the plaintiff knew that such was their intention. But the court held that this was no bar to the recovery:

“I am not aware of any principle of law which compels a merchant, laborer or mechanic to overlook the morals of his customers. He is not the keeper of their morals in any sense of the word. If he sells goods to a gambler, the sale is perfect on the delivery, and the gambler must pay for them, whatever his purpose may have been in making the purchase. If the merchant is not to be paid out of the illicit gains of a gambler, and is not connected by contract with the object the gambler has in view, his knowledge of the purpose does not vitiate the sale.”

§ 340. *Exceptions to the American Rule.*

To the doctrine stated in the last section there are two exceptions, viz.: (a) Where the contemplated illegal act is of a highly heinous character; (b) where the vendor does something beyond making the sale, in aid or furtherance of the unlawful design.

⁵ *Udike v. Campbell*, 4 E. D. Smith, 570; *Lyman v. Townsend*, 24 La. Ann. 625.

⁶ *Waugh v. Beck*, 114 Pa. St. 422, 60 Am. Rep. 354; *Howell v. Stewart*, 54 Mo. 400; *Lewis v. Alexander*, 51 Tex. 578.

⁷ *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205; *Webber v. Donnelly*, 33 Mich. 469; *Jameson v. Gregory*, 4 Met. 363; *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617.

⁸ 49 Mo. 474, 8 Am. Rep. 138.

(a) There may be cases, though likely to be of rare occurrence, where the bare knowledge of the use to which the article sold is to be put will prevent recovery of the price. If a person sells arsenic with the knowledge that the purchaser intends to poison another with it, the enormity of the offense intended is such as to render it morally certain that the conscience of the seller would have prevented him from making the sale had he not participated in the design.¹ In a Missouri case² it is said:

“*Aside from felonies or crimes involving great moral turpitude*, the mere knowledge of the lender or vendor, that the money loaned or the property sold is designed to be applied to an unlawful purpose, will not prevent a legal recovery based on such loan or sale.”

In the case of contracts made during the late war for supplies to be used by the Confederates in aid of the rebellion, when the question came before the Supreme Court of the United States in *Hanauer v. Doane*,³ it was decided that no action could be maintained on such contracts, on the ground that the vendor knew that the property was to be employed in the commission of a criminal act, the court saying:

“With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it without turpitude when he knows or has every reason to believe that such money or goods are to be used for the perpetration of a heinous crime and that they were procured for that purpose.”

(b) If it appears from some stipulation or act of the

¹ Benj. Prin. of Contr. 97; *Hanauer v. Doane*, 12 Wal. 342; *Tracy v. Talmage*, 14 N. Y. 215; *Tatum v. Kelly*, 25 Ark. 209.

² *Howell v. Stewart*, 54 Mo. 402.

³ 12 Wall. 342.

party⁴ or from the circumstances of the case⁵ that he made the agreement with the view of aiding in the accomplishment of such purpose, he cannot recover. If in addition to knowledge of the illegal intention there is any participation in it on his part, he is guilty in the eye of the law.⁶ Thus, in the case of the purchase by a prostitute given in the last section if it was shown that the seller expected to be paid from the profits of the vendee's prostitution, or that he sold the goods to enable her to carry it on, "so that he might appear to have done something in furtherance of it," he could not recover the price.⁷ So, one may lawfully sell goods to another, although he knows the buyer intends to smuggle them into another country and to evade the revenue laws, and this is no defense to an action for the price, yet if the seller does any act to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded as *particeps criminis* and cannot recover.⁸ Where liquor was sold in one State to be taken to a State and there resold, the sale of liquor in the latter State being contrary to law the court said:

"If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is of the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller while aware of his intent, is indifferent to it, or disapproves of it, it may be doubtful whether the connection is sufficient."⁹

⁴ Arnot v. Pittston, etc., Coal Co., 68 N. Y. 558; Gaylord v. Soragen, 32 Vt. 110; Banchor v. Mansel, 47 Me. 58; Skiff v. Johnson, 57 N. H. 475; Webster v. Munger, 8 Gray, 584; Ralston v. Brady, 20 Ga. 449.

⁵ White v. Buss, 3 Cush. 448; Tracy v. Talmage, 14 N. Y. 214, 67 Am. Dec. 132; Burns v. Seep, 6 Ohio Dec. 847; Albert Furniture Co. v. Mobley, 141 Ga. 456, 81 S. E. 196.

⁶ Cooper v. Thompson, 20 La. Ann. 182, 96 Am. Dec. 372; Cheeney v. Duke, 10 S. & J. 11.

⁷ Hubbard v. Moore, 24 La. Ann. 591, 13 Am. Rep. 128; Sampson v. Townshend, 25 La. Ann. 78; Reed v. Brewer, 90 Tex. 20, 36 S. W. 99 (Tex.).

⁸ See Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132.

⁹ Graves v. Johnson, 156 Mass. 211, 214, 30 N. E. Rep. 818.

Thus where the plaintiffs sold goods to defendant, with the knowledge that she intended to make an unlawful use of them; and to enable her to make such unlawful use, by her direction, put them up in packages in a convenient form for sales in violation of the law, with labels thereon calculated to facilitate such sales, it was held that the plaintiffs could not recover the price.¹⁰ So where packages of candy with articles of silverware inside were prepared by the manufacturer especially to be used by the buyer for lottery purposes;¹¹ where the plaintiff, having a reputation as a seedsman, sold to the defendant a large quantity of empty bags for seeds with the plaintiff's label, the same to be filled by the purchaser with seeds; and where a contract was made for the sale of domestic sardines, to be put up with labels representing the sardines as foreign sardines.¹²

It is on this ground that it is held in numerous cases that one loaning money with a knowledge that it is to be used for an illegal purpose, as for gambling, cannot recover the loan. No legal distinction can be drawn between a loan of money and a sale of goods as affecting this question, but money is frequently, if not in the majority of cases, loaned to assist another in some undertaking; and if the undertaking be illegal, as for instance a gambling transaction, the lender, knowing of the borrower's intention and assisting by way of a loan, may be deprived of his right to recover the money loaned.¹³

“It does not follow that a lender has a guilty purpose merely because he knows or believes that the borrower has. There may be a visible line between the motives of the two. If it were not so men would have great responsibilities for the

¹⁰ *Skiff v. Johnson*, 57 N. H. 475.

¹¹ *Hull v. Ruggles*, 56 N. Y. 424.

¹² *Bliss v. Bloomer*, 23 Barb. 604; *Materne v. Howitz*, 101 N. Y. 24; *Church v. Proctor*, 66 Fed. Rep. 210.

¹³ Mr. Knowlton's notes to *Anson Contr.* 192, citing among many other cases *Cutler v. Welsh*, 43 N. H. 498; *Peck v. Briggs*, 3 Denio, 107; *Williamson v. Bailey*, 78 Mo. 636.

motives and acts of others. A person may loan money to his friend—to the man, and not to his purpose. He may not be willing to deny his friend, however much disapproving his acts. In order to find the lender in fault, he must himself have an intention that the money shall be illegally used. . . . The lender must in some manner be a confederate or participator in the borrower's act, be himself implicated in it. He must loan his money for the express purpose of promoting the illegal design of the borrower; not intend merely to serve or accommodate the man."¹⁴

The true doctrine is best expressed in a Pennsylvania case where it is said that to invalidate a loan for a gambling transaction, the lender must not only have known the use intended, but must have been implicated as a confederate though not necessarily for gain.¹⁵

§ 341. *Agreements Legal in One Place but Illegal in Another.*

The subject of conflict of laws rests entirely upon what is called the comity of nations. The law of one State has no force or authority beyond the jurisdiction of its own courts. Whatever effect is given to it by the courts of other countries or States is the result of that international comity which is the produce of modern civilization. It is left to each nation to say how far it will recognize this comity and to what extent it will be permitted to control its own laws.

"That the laws of any State cannot, by any inherent authority, be entitled to respect extraterritorially, or beyond the jurisdiction of the State which enacts them, is the necessary result of the independence of distinct sovereignties. But the courtesy, comity, or mutual convenience of nations, amongst which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts; so that it is now a principle generally received, that contracts are to be construed and interpreted ac-

¹⁴ Tyler v. Carlisle, 79 Me. 210, 9 Atl. Rep. 356.

¹⁵ Waugh v. Beck, 114 Pa. St. 422, 60 Am. Rep. 354; Hines v. Union Trust Co., 48 S. W. 120 (Ga.), where a bank loaned money knowing that it was to be used to compound a felony.

cording to the laws of the State in which they are made, unless from their tenor it is perceived that they were entered into with a view to the laws of some other State. And nothing can be more just than this principle. For, when a merchant of France, Holland, or England, enters into a contract in his own country, he must be presumed to be conversant of the laws of the place where he is and to expect that his contract is to be judged of and carried into effect according to those laws; and the merchant with whom he deals, if a foreigner, must be supposed to submit himself to the same laws, unless he has taken care to stipulate for a performance in some other country, or has, in some other way, excepted his particular contract from the laws of the country where he is."¹

It has come to be a well-settled principle that the validity of a contract will be determined by the law of the place where it is made or where it is intended to be performed,² unless the parties have expressly provided that it shall be governed by the law of a particular country.³ Therefore an agreement illegal and void in the country where it was made will not be enforced in a country where it would have been perfectly valid had it been made there, and an agreement legal and valid in the country where it was made will be enforced in the courts of a country whose laws would have rendered it void had it been entered into there.⁴ In short, an agreement good where made is good everywhere and an agreement invalid where made is invalid everywhere.

¹ *Blanchard v. Russell*, 13 Mass. 1, 7 Am. Dec. 106.

² *Harrison v. Sterry*, 5 Cranch. 289; *Aymar v. Sheldon*, 12 Wend. 439, 27 Am. Dec. 137; *Marvin Safe Co. v. Norton*, 48 N. J. (L.) 415, 57 Am. Rep. 566; *Pritchard v. Norton*, 106 U. S. 124; *Smith v. Smith*, 2 Johns. 235, 3 Am. Dec. 410; *Kennedy v. Knight*, 21 Wis. 340, 94 Am. Dec. 543. The presumption is that the place of performance is the place where it was made. *Allshouse v. Ramsey*, 6 Whart. 331, 37 Am. Dec. 417.

³ *U. S. Savings, etc., Co. v. Scott*, 98 Ky. 695, 34 S. W. Rep. 235, 17 K. L. Rep. 1244; *Greer v. Poole*, 5 Q. B. D. 272.

⁴ Cases in last notes. *White v. Hart*, 3 Wall. 646; *Brown v. Brown*, 15 R. I. 422, 7 Atl. Rep. 403; *Halloran v. Jacob Schmidt Brewing Co.*, 162 N. W. 1082 (Minn.).

But there are several exceptions to this rule, viz.:

1. Where the agreement is contrary to good morals.⁵ Thus it has been held that agreements to bribe or corruptly influence officers of a foreign government, even if not prohibited by the law of the country in which they are made, will not be enforced in the courts of the United States;⁶ and this is not in the interest of the foreign government, but for the sake of morality and the dignity of the law at home. So a marriage between persons within the prohibited relationship or plural marriages though valid in a foreign country will not be recognized here.⁷

“Where the contract is void on the ground of immorality or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilized country would be called on to enforce it.”⁸

2. Where the agreement is contrary to the legislation of the State, *i. e.*, its constitution and statutes; or is injurious to the interest of its citizens.⁹ Thus where a statute of Massachusetts made an agreement to make a will “not binding” unless in writing, A being in Maine, orally promised B that if she would leave Maine and take care of her during her life she would leave her all her property at her death. B accepted the proposal, went with A to Massachusetts, performed her part of the agreement, and at her death sued her executor on the promise. The oral contract was good in Maine, but the court of Massachusetts refused to enforce it, saying:

⁵ Dicey Confl. L. 558; *Robinson v. Bland*, 2 Burr, 1048; *Kaufman v. Gordon*, 1 K. B. Div. 591 (1904).

⁶ *Oscanyan v. Arms Co.*, 103 U. S. 261.

⁷ *Pennegar v. State*, 87 Tenn. 244, 10 Am. St. Rep. 648; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41; *Greenwood v. Curtis*, 6 Mass. 378, 4 Am. Dec. 145; *Brook v. Brook*, 9 H. L. Cas. 193.

⁸ *Re Missouri Steamship Co.*, 42 Ch. Div. 321.

⁹ *Rhodes v. Savings Soc.*, 50 N. E. Rep. 998 (Ill.); *Watson v. Murray*, 23 N. J. (Eq.) 257; *Pope v. Hanke*, 155 Ill. 617, 40 N. E. 837.

“The statute embodies a fundamental policy. The ground is the prevention of fraud and perjury, which are deemed likely to be practiced without this safeguard. . . . If the policy of Massachusetts makes void an oral contract of this sort made within the State, the same policy forbids that Massachusetts’ testators should be sued here upon such contract without written evidence wherever it is made.”¹⁰

3. Where the agreement is contrary to the public policy of the State.¹¹ In *Rousillon v. Rousillon*,¹² the parties had entered into an agreement in France in restraint of trade. The agreement was perfectly valid in France, where the common-law doctrine regarding such contracts as against public policy is unknown. It was held that the agreement, though good where made, would not be enforced by an English court.

“It has been insisted, that even if the contract was void by the law of England as against public policy, yet inasmuch as the contract was made in France it must be good here, because the law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this country. It appears to me, however, plain on general principles, that this court will not enforce a contract against the public policy of this country wherever it may be made. It seems to me almost absurd to suppose that the courts of this country should enforce a contract which they consider to be against public policy, simply because it happens to have been made somewhere else.”

In *Flagg v. Baldwin*,¹³ an agreement was made in New York whose object was the speculating in stocks upon margins. Suit was brought in New Jersey. The agreement was valid in New York but was in violation of the statute of New Jersey as to gaming contracts. The question was presented

¹⁰ *Emery v. Burbank*, 163 Mass. 323.

¹¹ *Hope v. Hope*, 8 De G. M. & G. 731; *Grell v. Levy*, 16 C. B. N. S. 73; *Wight v. Rindskopf*, 43 Wis. 344; *Liverpool Steam Co. v. Ins. Co.*, 129 U. S. 397.

¹² 14 Ch. Div. 351.

¹³ 38 N. J. (Eq.) 269.

whether such an agreement, which had it been made in New Jersey would have been void and unenforceable, would be enforced by the court, because it was made in another State, according to whose laws it was valid. This question the court answered in the negative:

“An almost complete agreement exists upon the proposition that a contract valid where made will not be enforced by the courts of another country, if in doing so they must violate the plain public policy of the country whose jurisdiction is invoked to enforce it, or if its enforcement would be injurious to its interest or conflict with the operation of the public laws of that country. . . . We are brought, then, to the question whether our law against gaming is such a public law, and establishes such a public policy as to require us to refuse to enforce foreign contracts in conflict with it, in a case like that under consideration. I think this question must be answered in the affirmative. . . . In my judgment our law against gaming is of such a character, and is designed for the prevention of vice producing injury so widespread in its effect, the policy evinced thereby is of such public interest that comity does not require us to here enforce a contract, which by that law is adjudged as unlawful, and so prohibited.”¹⁴

§ 342. *Agreements Legal at One Time and Illegal at Another.*

A legal agreement cannot become illegal by a subsequent change in the law, and therefore if an agreement when entered into is legal, and afterwards made illegal by statute, it is not affected by the statute.¹ An agreement to sell a slave entered into when slavery was legal, was held by the Supreme Court of the United States not to be rendered illegal by the subsequent abolition of slavery.² So if an agreement

¹⁴ See in accord with this decision *Bartlett v. Collins*, 85 N. W. 703 (Wis.). Contra. *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 20, 61 S. W. 617, criticised in 54 Cent. L. J. 223.

¹ As to discharge of contract by subsequent impossibility created by law, see post.

² *Boyce v. Tabb*, 18 Wall. 546.

for a high rate of interest is made at a time when it was legal the promisor must pay what he promised even though before suit is brought against him, a usury law has been enacted.³ And if the agreement, when it is made, conforms to the public policy of the State, a change in public policy does not make it void.⁴

On the other hand where a statute is in force at the time a contract is entered into, which makes it illegal, no action can be maintained on it though the statute is afterwards repealed.⁵

“Whether the provisions of the statute were wise or not it is not our province to determine. While in existence it was a binding rule of action and its subsequent repeal did not impair its binding force while it remained on the statute book.”⁶

An agreement which provides for something known to both parties to be not lawful at the time, being done in the event and only in the event of its being made lawful, is free from objection and valid as a conditional contract;⁷ unless the thing were of such a kind that its becoming lawful could not be properly contemplated.⁸

³ Richardson v. Campbell, 34 Neb. 181, 51 N. W. Rep. 753.

⁴ Stephens v. R. Co., 109 Cal. 86, 41 Pac. Rep. 783. See Hartford Ins. Co. v. R. Co., 62 Fed. Rep. 910.

⁵ Denning v. Yount, 62 Kas. 417, 61 Pac. 803; Ludlow v. Hardy, 38 Mich. 690; Bailey v. Mogg, 4 Denio, 60; Handy v. St. Paul Pub. Co., 41 Minn. 188, 42 N. W. 872; Milne v. Huber, 3 McLean, 212. But see Curtis v. Leavitt, 15 N. Y. 85. “Where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant.” Brewster v. Kitchen, 1 Salk. 198.

⁶ Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671.

⁷ Taylor v. Chichester, etc., R. Co., L. R. 4 H. L. 628; Mayor of Norwich v. Norfolk R. Co., 4 E. & B. 397, 24 L. J. Q. B. 105.

⁸ In a recent case B promised A, whose husband was alive, to marry her when she obtained a divorce. The agreement was declared void. Johnson v. Iss, 85 S. W. Rep. 79 (Tenn.).

§ 343. *Securities Given on Illegal Transaction.*

Repeating a promise which is void for illegality cannot give it any validity. Therefore if a connection between the original illegal transaction and a new promise can be traced, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery.¹ In the leading case of *Fisher v. Bridges*,² the plaintiff sued the defendant upon a covenant to pay a sum of money. The defense was that the covenant was security for the payment of a sum of money due upon a purchase of land agreed to be sold for a purpose declared to be illegal by statute. The lower court ruled that the defendant was bound, inasmuch as there was nothing unlawful in a simple promise to pay money. But on appeal it was held that the illegality, when proved, tainted the subsequent promise, and that this was not a simple promise to pay money, but that it “sprang from and was the creature of an illegal transaction.” This principle is well settled in our courts and no writing, seal or other solemnities in the formation of the contract will preclude the court from receiving oral evidence to show that the transaction was illegal and the instrument therefore void. The defense of illegality is allowed, not as a favor to or in the interest of either of the contracting parties, but in the interest of the public.³ Therefore deeds, bonds or other securities given for illegal debts are invalid and not enforceable.⁴

In the case of negotiable instruments we have to consider not only the effect of the illegality as between the original parties to the contract, but its effect upon subsequent

¹ *Comstock v. Draper*, 1 Mich. 481, 53 Am. Dec. 78; *Harrison v. McCluney*, 32 Mo. (App.) 481; *Brown v. Kinsey*, 81 N. C. 245; *Wagner v. Biering*, 65 Tex. 506.

² El. & Bl. 642.

³ *Lyon v. Waldo*, 36 Mich. 353; *Wooden v. Shotwell*, 23 N. J. (L.) 465; *Buffendeau v. Brooks*, 28 Cal. 641.

⁴ 9 Cyc. 563; 13 C. J. 510.

holders of the instrument. In these cases, the ordinary presumption in favor of the holder of such an instrument does not exist. Upon proof of the illegality which tainted the instrument in its inception, the holder must show that he is a holder for value; that is, that he gave consideration for the bill; and even then, if he can be proved to have been aware of the illegality, he will be disentitled to recover. But the illegality of consideration is no defense to a negotiable instrument that has passed into the hands of a *bona fide* purchaser, unless the statute expressly or by necessary implication⁵ declares that the instrument given on such illegal consideration shall be absolutely void;⁶ for where the note is expressly made *void* by statute, even a *bona fide* holder cannot recover on it.⁷

§ 344. *Distinction Between "Void," "Voidable" and "Unenforceable."*

An agreement is either "valid," "void," "voidable" or "unenforceable." A void agreement is one destitute of legal effect. It is a mere nullity and good for no purpose whatever. It is binding upon neither party and may be attacked as invalid by strangers. It does not require any disaffirmance to avoid it, but may be simply disregarded and it cannot be ratified and made valid. Of this nature are all of the

⁵ A statute by necessary implication makes a note void when it makes the contract under which it is executed void and criminal. *Snoddy v. Bank*, 88 Tenn. 573. But see *New v. Walker*, 108 Ind. 365.

⁶ *Vallett v. Parker*, 6 Wend. 615; *Town of Eagle v. Kohn*, 84 Ill. 292; *Root v. Merriam*, 27 Fed. 909; *Pope v. Hanke*, 40 N. E. 839 (Ill.); *Koster v. Seney*, 68 N. W. 524 (Ia.); *Ayer v. Yonker*, 50 Pac. 218 (Colo.).

⁷ *Aurora v. West*, 22 Ind. 88; *Andrews v. Hoxie*, 5 Tex. 171; *Ayer v. Yonker*, *supra*; *Boughner v. Meyer*, 5 Colo. 73; *Irwin v. Marquett*, 59 N. W. 38 (Ind.).

agreements considered in this chapter except one or two classes which have been already noticed as exceptions.¹

A "voidable" contract is one that is good both as between the parties to it and as to third persons, until it is avoided by the party entitled to avoid it. It is valid and binding until thus disaffirmed and its infirmity may be completely cured by a ratification by the party at whose instance it might have been avoided. Of this class are those in which one of the parties has a legal incapacity or where the agreement lacks the element of consent or wants a legal consideration.²

An "unenforceable contract" is one that, while perfectly valid, is incapable of proof pending the fulfillment of certain conditions. A contract which is unenforceable cannot be set aside at the option of one of the parties to it; the obstacles to its enforcement do not touch the existence of the contract, but only set difficulties in the way of action being brought or proof given. Of this class are contracts which fail to comply with the provisions of the statute of frauds, and so cannot be proved; or contracts by word of mouth or in writing which are required by statute or law to be in writing or under seal, or contracts which have fallen under the statute of limitations, and can only be revived by an acknowledgment in writing.

¹ *McFarland v. Hein*, 127 Mo. 327, 29 S. W. 1030. The word "void" is sometimes used in statutes and very frequently in the reports where the word "voidable" is intended to be used. For the construction of the word "void" see *Fuller v. Hasbrouck*, 46 Mich. 82; *Allis v. Billings*, 6 Metc. 417; *Goldsmith v. Hampton*, 5 C. B. (N. S.) 108; *Kearney v. Vaughan*, 50 Mo. 284. As to construction of "voidable" see *Pearsoll v. Chapin*, 44 Pa. St. 15; *Alexander v. Nelson*, 42 Ala. 462. In *Beecher v. Marq. & Pac. R. M. Co.*, 45 Mich. 108, *Cooley, J.*, said: "If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determinate individuals who are *sui juris*, the purpose is sufficiently accomplished if they are given the liberty of avoiding it."

² See *Ante*, Chap. VI.

PART II.

THE OPERATION OF THE CONTRACT.

§ 345. INTRODUCTORY.

§ 345. *Introductory.*

The making of the agreement, its form, the question of consideration, the capacity of the parties, the necessity of consent to its terms and the requirement that the object of the agreement shall be legal having been discussed, we now consider the question as to whom the rights and liabilities under the agreement may at once extend (Chap. VIII) and to whom they may subsequently pass by assignment (Chap. IX).

CHAPTER VIII.

THE LIMITATIONS TO THE OBLIGATION AND RIGHT.

- SECTION 346. Two Parties Necessary.
347. The Liability of One not a Party.
348. Agreement May Impose Duties on Third Parties.
349. The Rights of One not a Party.
350. Exceptions.
351. Where False Representation is Made.
352. Where Breach of Duty Connected with Contract.
353. Promise for Special Benefit of Third Person.
354. Trust—Quasi-Contract—Near Relationship—Agency.
355. Several, Joint and Joint and Several Promisors.
356. Several, Joint and Joint and Several Promisees.

§ 346. *Two Parties Necessary.*

Two parties are essential to every contract¹ for a man cannot sue himself or enter into any obligation enforceable by law with himself;² nor can the same person be a party on both sides, although other persons be joined with him on the one side or the other.³ One of the parties, however, may not be in existence at the time, or at least not ascertained; as in the case of an offer of a reward, which may be accepted by any one performing the services required.⁴ But a promise made to everybody is not a promise to any particular person and is too indefinite as a rule to support an agreement.⁵ No action can be maintained upon an instrument in writing for the payment of money, unless the in-

¹ Carson v. Clark, 1 Scam. 113, 25 Am. Dec. 79; Gorham v. Meacham, 63 Vt. 231, 22 Atl. Rep. 572.

² Taussig v. Hart, 58 N. Y. 425; Collins v. Tilton, 58 Ind. 374; Whitehead v. Hellen, 76 N. C. 99.

³ Moffatt v. Millingen, 2 B. & C. 124, note; DeTastet v. Shaw, 1 B. & Ald. 664; Faulkner v. Lowe, 2 Ex. 595; Eastman v. Wright, 6 Pick. 316.

⁴ Ante, Chap. I.

⁵ Clark v. R. Co., 81 Fed. Rep. 282.

strument shows on its face to whom it is payable.⁶ But a variance or mistake in the names of parties to a contract, whether individuals or corporations, is not fatal to their contract if there be a sufficient description of the parties, by which they may be identified.⁷ The question as to who are the parties to a contract is one for the jury.⁸

§ 347. *The Liability of One Not a Party.*

Contractual obligation being the result of a voluntary act, one cannot be bound unless his own act has given rise to it; therefore one is not bound by a contract who is not a party to it.¹ Thus A by paying B's debt cannot make B liable to A.

“One man, who is under no obligation to pay the debt of another, cannot without his request officiously pay that other's debt, and charge him with it. If the debtor ratify such payment, the debt is discharged, and he becomes liable to the stranger for money paid to his use. If he refuse to ratify it, he disclaims the payment, and the debt stands unpaid as to him. In the one case, the stranger would at law sue the debtor for money paid for his use. If his payment is not ratified, he may go into equity praying that, if the debtor ratify it, said debtor may be decreed to repay him, or, if the debtor do not ratify the payment, that the debt be treated as unpaid as between him and the debtor, and that it be enforced in his favor as an equitable assignee. . . . But how as to the creditor. When a stranger pays him the debt of a third party without the request of such third party, can the creditor say the debt is yet unpaid, and enforce it against the debtor, as is attempted to be done here? Can he accept such payment and say, because it was made by a stranger,

⁶ Mayo v. Chenowith, 1 Ill. 200.

⁷ Medway Manfg. Co. v. Adams, 10 Mass. 360.

⁸ Miller v. Ford, 4 Rich. 376, 55 Am. Dec. 687.

¹ 9 Cyc. 372; Crawford v. Brown, 21 Colo. 272, 40 Pac. Rep. 692; Derickson v. Krause, 4 Ill. App. 507; New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381, 21 N. E. 947; Bolles v. Carli, 12 Minn. 113; Schuster v. R. Co., 60 Mo. 290.

it is no payment? Is his acceptance not an estoppel by conduct *in pais*, as to him.”²

If it be a mere money obligation, then, and the debtor ratify the payment the debt is discharged. But one's neglect to perform his contract to do something does not authorize another person to perform it and substitute himself as creditor. A, for example, has bound himself for the support of B. He refuses to do so, whereupon B applies to C to board him, which C does with A's knowledge. A is not liable to C for there is no express contract and the law will not imply a contract to substitute one creditor for another.³

B employed A to transport goods from London to Amsterdam. A agreed with C to put the whole conduct of the transport into his hands; he did the work and sued B for his expenses and commission. It was held that B was not liable,⁴ for

“there is no pretense that the defendant ever authorized A to employ any other to do the whole under them: the defendant looked to A only for the performance of the work, and A *had a right to look to the defendants for payment, and no one else had that right.*”⁵

And as to the creditor it is now well settled that the acceptance by him of the payment, discharges the debt.⁶

§ 348. *Agreement May Impose Duties on Third Parties.*

But though a contract cannot impose the burdens of an

² *Crumlish v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. Rep. 456.

³ *Moody v. Moody*, 14 Me. 307; *Peers v. Board of Education*, 72 Ill. 508; *Baltzer v. R. Co.*, 115 U. S. 634; *Fairchild v. King*, 102 Cal. 320.

⁴ *Schmaling v. Thomlinson*, 6 Taunt. 147.

⁵ “A man cannot be made debtor to any indefinite number with whom he never contracted, by their making arrangements with one with whom he has contracted to deliver property on his contract.” *Rossman v. Townsend*, 17 Wis. 95, 84 Am. Dec. 733; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9.

⁶ *Crumlish v. Central Imp. Co.*, ante.

obligation upon one who was not a party to it, nevertheless a contract does impose a *duty*, upon persons extraneous to the obligation, not to interfere with its due performance. In *Lumley v. Gye*,¹ the manager of an opera house, engaged a singer to perform in his theater. The defendant induced her to break her contract. It was held (without deciding that an action would lie against one who procured the breach of any kind of contract) that such an action would lie for inducing a servant to quit the service of his master. Subsequently in *Bowen v. Hall*,² the case was not limited to the relation of master and servant, but the broad principle was laid down that a man who induces one of the parties to a contract to break it, intending thereby to injure the other, is liable to an action. The decisions in the United States are not harmonious. It is not denied in our courts that an action will lie for wrongfully enticing away another's servant or apprentice.³ But in a Maine case,⁴ it is said:

"A man may advise another to break a contract, if it be not a contract for *personal services*. He may use any lawful influences or means to make his advice prevail. In such a case the law deems it not wise or practicable to inquire into the motive that instigates the advice. His conduct may be morally and not legally wrong."

¹ 2 E. & B. 216.

² 6 Q. B. Div. 339, followed in *Temperton v. Russell*, 1 Q. B. 715 (1893); *Quinn v. Leatham*, A. C. 495 (1901); *South Wales Miners v. Glamorgan Coal Co.*, A. C. 239 (1905).

³ *Lawson Rights. Rem. & Pr.*, 289; *Woodward v. Washburn*, 3 Denio, 369; *Bixby v. Dunlap*, 56 N. H. 456, 22 Am. Rep. 475; *Noice v. Brown*, 39 N. J. (L.) 569; *Ames v. Union Railway Co.*, 117 Mass. 541; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780; *Walker v. Cronin*, 107 Mass. 555; *Jones v. Blocker*, 43 Ga. 331; *Daniel v. Swearinger*, 6 S. C. 297, 24 Am. Rep. 471; *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680; *Butterfield v. Ashley*, 2 Gray, 254; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Milburne v. Byrne*, 1 Cranch C. C. 239; *Haight v. Badgeley*, 15 Barb. 449.

⁴ *Haywood v. Tillson*, 75 Me. 100.

And such is the law of several States.⁵

On the other hand in Massachusetts it is said that the principle of *Lumley v. Gye* applies to "all contracts of employment, if not to contracts of every description;"⁶ and in North Carolina that "the same reasons cover every case where one person maliciously persuades another to break *any* contract with a third person. It is not confined to contracts of service."⁷

There is a distinction between inducing a man to break a contract and inducing him not to make a contract.

To break a contract is actionable, but not to refuse to enter into one. Hence to induce the nonformation of a contract is actionable in cases only where unlawful means have been used.⁸

But one may justify his conduct by showing that he acted in furtherance of a social duty, *e. g.*, protecting school children from exposure to disease.⁹

⁵ *Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. Rep. 57; *Boyson v. Thorn*, 98 Cal. 578, 33 Pac. Rep. 492; *Glencoe Land Co. v. Hudson Co.*, 138 Mo. 439; *McCann v. Wolff*, 28 Mo. (App.) 447.

⁶ *Walker v. Cronin*, 107 Mass. 555.

⁷ *Jones v. Stanley*, 76 N. C. 355, and see *Dudley v. Briggs*, 141 Mass. 584; *Rice v. Manley*, 66 N. Y. 82; *Benton v. Pratt*, 2 Wend. 385; *Jones v. Blocker*, 43 Ga. 321; *Burger v. Carpenter*, 2 S. C. 7; *Angle v. R. Co.*, 151 U. S. 1. A alleged that L had employed him to institute proceedings to have L's husband declared a prodigal, that the proceedings were duly instituted, and that defendant, with knowledge of fact, induced L by false representations to break the contract and withdraw the proceeding. Held sufficient. *Solomon v. Du Preez*, 37 So. African L. J. 466. But a party to a contract, who is injured by reason of the failure of the other party to comply with its terms, cannot recover damages for the negligent act of a third person, by which the performance of the contract was rendered impossible. *Byrd v. English*, 117 Ga. 191, 43 S. E. 419.

⁸ *Quinn v. Leatham*, supra; *Sherry v. Perkins*, 147 Mass. 212; *Benton v. Pratt*, 2 Wend. 385. One not a party to a contract is not liable in damages on its breach, although he may have aided and abetted the contracting party in violating it. *Gallup El. Co. v. Pac. Imp. Co.*, 16 N. M. 86, 113 Pac. 848.

⁹ *Legris v. Marcotte*, 129 Ill. App. 67.

§ 349. *The Rights of One Not a Party.*

One cannot acquire rights under a contract to which he is not a party. The reason for the rule requiring privity of contract in an action founded on a contract is that the

“Object of parties in inserting in their contracts specific undertakings, with respect to the work to be done, is to create an obligation *inter esse*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts.”¹

Therefore an action for the breach of a contract can be brought only by one who was a party to it.²

The following are illustrations of the principle:

1. A agrees to build a wagon for B but he builds it so unskillfully that when it is used by C to whom B has loaned or sold it, it breaks down and C is injured.³ 2. A, a blacksmith, negligently shoes B's horse. C hires the horse from B and is injured while riding it, through the defective shoeing.⁴ 3. A, an attorney, is employed by B, who is about to purchase a piece of real estate, to examine the title. B, without using the care and skill which he is bound to use, reports that the title is good; C relying on his report purchases the land, but the title turns out not to be good and C is damaged.⁵ 4. A, a water company, contracts with B, a city, to keep at all times a sufficient supply of water for the use of the city for the extinguishment of fires. It fails to keep its contract whereby the house of C is burned, there being no supply

¹ Kahl v. Love, 37 N. J. (L.) 5.

² Williamson v. McGrath, 180 Mass. 55, 61 N. E. 636; Litchfield v. Garratt, 10 Mich. 426; Harris v. McKinley, 57 Minn. 198, 58 N. W. 991; Roddy v. R. Co., 104 Mo. 234, 15 S. W. 1112; Heizer v. Kingsland Co., 110 Mo. 65; Johnson v. Morgan, 68 N. Y. 494.

³ Winterbottom v. Wright, 10 M. & W. 100.

⁴ Thomas v. Winchester, 6 N. Y. 377.

⁵ National Bk. v. Ward, 100 U. S. 195. But see Economy Building Co. v. West Jersey Title Co., 64 N. J. L. 27, where the certificate was made for C's special benefit.

of water.⁶ 5. A employs B to draw his will and instructs him to include a legacy to C. B by neglect fails to include C, whereby C is deprived of the intended legacy.⁷ 6. A builds a house for B but does so so negligently that a floor gives way and C, a guest of B, is injured.⁸ 7. A builds a bridge for a county and agrees with it to keep it in repair and lighted. A fails to light it and C is injured.⁹ 8. A railroad contracts with the Government to carry the mails and its mail agents. C, a mail agent, is injured in an accident while performing his duties.¹⁰

In none of these cases has C any right of action as he was not a party to the broken contract.

§ 350. *Exceptions.*

To the general rule there are the following exceptions: (a) Where a false representation is made. (b) Where a breach of duty is connected with the contract. (c) Where a promise is made for the special benefit of the third person,¹ and (d) Where it is a question of trust, quasi-contract, near relationship or agency.

⁶ Ferris v. Carson Water Co., 16 Neb. 44, 40 Am. Rep. 485; Becker v. Keokuk Water Co., 79 Ia. 419; Phoenix Ins. Co. v. Trenton Water Co., 42 Mo. (App.) 118; German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220; Contra. Paducah Lumber Co. v. Water Co., 89 Ky. 340.

⁷ Buckley v. Gray, 110 Cal. 339, 42 Pac. 900.

⁸ Curtin v. Somerset, 140 Pa. St. 70, the court saying: "The consequences of holding the opposite doctrine would be far reaching. If a contractor who erects a house, who builds a bridge or performs any other work, the manufacturer who constructs a boiler, piece of machinery or a steamship, owes a duty to the whole world that his work or his machine or his steamship shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned."

⁹ Styles v. Long Co., 57 Atl. 448 (N. J.).

¹⁰ Nolton v. R. Co., 15 N. Y. 444.

¹ In Louisiana, it is held that a penal obligation cannot be made for the benefit of third persons. New Orleans Assn. v. Magnier, 16 La. Ann. 338.

§ 351. *Where False Representation is Made.*

(a) Where in the making of an agreement a false representation is made by one of the parties it is not an actionable fraud unless it appears that it was made with the intention that it should be acted upon by the party injured.¹ If this intention is present however it is not necessary that it should have been made to him.² In *Langridge v. Levy*,³ the defendant sold a gun to the father of the plaintiff for the use of himself and his sons representing that the gun had been made by Nock and was "a good, safe, and secure gun;" the plaintiff used the gun; it exploded, and so injured his hand that amputation became necessary. He sued the defendant for the false representation, and the jury found that the gun was unsafe, and was not made by Nock. It was urged that the defendant could not be liable to the plaintiff for a representation not made to him; but the Court of Exchequer held that, inasmuch as the gun was sold to the father to be used by his sons, and the false representation made in order to effect the sale and as

"there was fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."

¹ In Louisiana, it is held that a penal obligation cannot be made for the benefit of third persons. *New Orleans Assn. v. Magnier*, 16 La. Am. 338. Ante. § 246.

² *Rice v. Manley*, 66 N. Y. 82; *Benton v. Pratt*, 2 Wend. 785; *Snow v. Judson*, 38 Barb. 210; *Bank v. Byers*, 139 Mo. 653.

³ 2 M. & W. 519. In *Carter v. Harden*, 78 Me. 528, 7 Atl. 392, the defendant has sold a horse to the plaintiff's husband, representing to him that it was a safe and kind horse. While the husband was taking the plaintiff for a drive with the horse, it became unmanageable and ran away, injuring the plaintiff. She brought action against the defendant on the false representation, but the Court held that she could not recover because it was not shown that the defendant told any falsehood with the intent that she should act upon it. The court distinguishes the case at bar from the English Gun Case, on the ground that in the latter case the defendant knew that the gun was to be used by the sons and made the false rep-

So as to representations made to commercial agencies by business men regarding their financial responsibility. Where such representations are made falsely with the design of procuring large credit and defrauding persons acting in reliance on them, an action of deceit will lie.⁴

§ 352. *Where Breach of Duty Connected With Contract.*

(b) Where one is charged simply with a breach of contract he is liable only to the party or parties with whom he has contracted, but if he is charged with a breach of duty he is not protected because he has made a contract with another in respect to the same thing.¹ Therefore if a person sells an article which he knows will do damage to others and conceals that fact he will be liable to third persons who are injured thereby;² and the same result follows where one erects and maintains a structure on another's land with his consent and knowingly allows it to remain in a dangerous condition.³ Where however the seller cannot be proved to have known of the defect but has been guilty of negligence in its manufacture or in its inspection, he is liable only to the person to whom he sold it and to whom only

representations, expecting the son as well as the father to rely upon them. "In the case at bar we do not find from the evidence that the defendant understood that the horse was being purchased for the wife or for her use, or that he expected the wife to rely upon any representations of his. The husband was in the business of peddling sewing machines, and the defendant understood the horse was wanted for use in that business."

⁴ *Eaton v. Avery*, 83 N. Y. 31; *Genessee County Savings Bank v. Mich. Barge Co.*, 52 Mich. 164; *Gainsville Bk. v. Bamberger*, 77 Tex. 48.

¹ *Smith*, Neg. p. 10.

² *Heizer v. Kingsland Co.*, 110 Mo. 65; *Wellington v. Oil Co.*, 104 Mass. 64; *State v. Fox*, 79 Md. 514, 29 Atl. 601; *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398; *Schubert v. Clark*, 49 Minn. 331, 51 N. W. 1103.

³ *Young v. Waters Pierce Oil Co.*, 84 S. W. Rep. 929 (Mo.).

he impliedly promised that it was free from defects⁴—unless the thing is in its very nature eminently dangerous to life or limb. The decisions are not very clear as to what classes of chattels come within this description. It has been laid down that a steam threshing machine,⁵ a steam boiler,⁶ a drop press,⁷ a lamp,⁸ a sidesaddle,⁹ a freight elevator¹⁰ and a fly wheel in a mill are not eminently dangerous, within this rule, the court in the last case saying:

“Poison is a dangerous subject. Gunpowder is the same. A torpedo is a dangerous instrument, as is a spring gun, a loaded rifle or the like. They are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are essentially, and in their elements, instruments of danger, not so, however, an iron wheel, a few feet in diameter and a few inches in thickness, although one part may be weaker than another. If the article is abused by too long use or by applying too much weight or speed, an injury may occur as it may from an ordinary carriage wheel, a wagon axle or the common chair in which we sit. There is scarcely an object in art or nature from which an injury may not occur under such circumstances. Yet they are not in their nature sources of danger nor can they with any regard to the accurate use of language be called dangerous instruments. That an injury actually occurred by the breaking of a carriage

⁴ *Heizer v. Kingsland Co.*, 110 Mo. 65. And illustrations in § 349 Ante. In a leading English case, *Heaven v. Pender*, 11 Q. B. Div. 503, Brett, M. R., formulated a general rule to the effect that where machinery or goods are supplied to be used immediately by a particular person or persons, or one of a class of persons, the duty arises to see that they are not defective or likely to do injury to those persons; but it is otherwise where the machinery or goods are supplied under circumstances in which it would be a chance by whom they would be used. This suggestion, however, has received no judicial support in this country.

⁵ *Heizer v. Kingsland Co.*, 110 Mo. 65.

⁶ *Loose v. Clute*, 51 N. Y. 494.

⁷ *McCaffray v. Mossberg Co.*, 23 R. I. 381, 50 Atl. 651.

⁸ *Longmead v. Holladay*, 6 Ex. 761; *Collins v. Selden*, L. R. 3 C. P. 495.

⁹ *Bragdon v. Perkins Co.*, 87 Fed. 109.

¹⁰ *Necher v. Harvey*, 49 Mich. 517, 14 N. W. 503.

axle, the failure of the carriage body, the falling to pieces of a chair or sofa or the bursting of a fly wheel does not in the least alter its character.”¹¹

But poisonous drugs are. In *Thomas v. Winchester*,¹² the defendant by his agent put up a jar of belladonna, a deadly poison, and negligently labeled it “dandelion,” a harmless medicine. He sold the jar thus labeled to one druggist, who sold it to another. The plaintiff’s wife being ill her physician prescribed dandelion, and the prescription was filled by the last-named druggist from the jar, and administered to her, by which she was injured. The defendant was held liable. So are illuminating oils,¹³ provisions supplied by a caterer at an entertainment,¹⁴ an automobile¹⁵ and a high scaffold.¹⁶

§ 353. *Promise for Special Benefit of Third Person.*

(c) Where a person makes an agreement for the special benefit of a third person, the beneficiary may sue upon it. Thus a contract between a city and a water company fixing the rates to be charged is for the special benefit of the individual residents who may sue upon it.¹ So of a contract between a town and a street railroad fixing the rate of fare.² This is not the English rule—because the courts of that

¹¹ *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543.

¹² 6 N. Y. 397; *Norton v. Sewall*, 106 Mass. 143; *Stevens v. Ludlow*, 46 Minn. 160; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. Rep. 118; *Peters v. Johnson*, 50 W. Va. 644, 41 S. E. Rep. 190.

¹³ *Elkins v. McKean*, 79 Pa. St. 493; *Wellington v. Oil Co.*, 104 Mass. 64. Contra, *Standard Oil Co. v. Murray*, 119 Fed. Rep. 572.

¹⁴ *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 N. E. Rep. 154.

¹⁵ *McPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1059; *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878, overruling 221 Fed. 801, 137 C. C. A. 279.

¹⁶ *Devlin v. Smith*, 89 N. Y. 470; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 387, 15 Am. Rep. 387.

¹ *Pond v. Water Co.*, 183 N. Y. 330.

² *Adams v. R. Co.*, 21 R. I. 134.

country still adhere to the necessity of privity of contract³ but it is the rule in the Federal courts and in most of the states, sometimes by judicial decision and sometimes by virtue of the statutory provisions existing in the code states that an action shall be prosecuted in the name of the real party in interest.⁴ And in some states in addition to the direct benefit, it is also required that the performance of the agreement shall be in discharge of a legal obligation of the promisee to the party suing.⁵

A general guaranty may be enforced by anyone who acts on the faith of it but not if he had no knowledge of it when he sold the goods or advanced the money to the person for whose accommodation it was given.⁶

But not a special guaranty. This can be enforced only by the party intended to be protected which is usually the one to whom it is addressed.⁷ Thus a guaranty to one purchasing stock of a corporation that the seller will pay all debts of the corporation cannot be enforced by creditors.⁸

But if the benefit is only incidental the third party is not permitted to sue.⁹

That the person to whose benefit the promisee may inure is uncertain at the time it is made, and that it cannot be known until the happening of a contingency, cannot deprive the

³ Price v. Easton, 4 B. & Ad. 433, and it is not the rule in a few states. Exchange Bank v. Rice, 107 Mass. 37; Linneman v. Moross, 98 Mich. 178.

⁴ 9 Cyc. 378; 13 C. J. 705.

⁵ Lawrence v. Fox, 20 N. Y. 268; Jefferson v. Asch, 53 Minn. 446; Barnes v. Ins. Co., 56 Minn. 38, 57 N. W. 314; Coleman v. Whitney, 62 Vt. 123, 20 Atl. 322.

⁶ McClung v. Means, 4 Ohio 196; Hart v. Wynne, 40 S. W. 848.

⁷ Birkhead v. Brown, 5 Hill, 634; 2 Denio 375; King v. Batterson, 13 R. I. 117.

⁸ John Horstman Co. v. Waterman, 173 Pac. 733.

⁹ Crandall v. Payne, 154 Ill. 627; 39 N. E. 601; Buckley v. Gray, 110 Cal. 339; 42 Pac. 900; Washburn v. Investment Co., 26 Oreg. 136, 38 Pac. 620; Burton v. Larkin, 36 Kan. 246; Howsmon v. Trenton Water Co., 119 Mo. 304; National Bank v. Grand Lodge, 98 U. S. 123.

person who afterwards establishes his claim to be the beneficiary of the promise of the right to recover upon it.¹⁰

The effect of a promise for another's benefit is to invest the person for whom it is made with right, as though the promise had been made to him. The person who procures the promise has no legal right to release or discharge the person who made the promise, from his liability to the beneficiary. It is under the sole control of the person for whose benefit it is made—as much so as if made directly to him.¹¹

§ 354. *Trust—Quasi-Contract—Near Relationship—Agency.*

(d) If A's promise to B amounts to a trust in favor of C, C can sue on it by virtue of the fiduciary relation which such a promise creates. Thus if a person conveys property to another directing that it shall be held for the benefit of a third person, not a party to the transaction, the latter may enforce the trust in a court of equity.¹

“In all the cases since *Tweddle v. Atkinson* (1 B. & S. 393), in which a person not a party to a contract has brought an action to recover some benefit stipulated for him in it, he has been driven, in order to avoid being shipwrecked upon the common law rule which confines such an action to parties and privies, to seek refuge under the shelter of an alleged trust in his favor.”²

Where the defendant has in his hands money which, in equity and good conscience, belongs to the plaintiff, it is no objection that there is want of privity between the parties to the action, or that the consideration did not move from

¹⁰ *Whitehead v. Burgess*, 61 N. J. L. 75.

¹¹ *Bay v. Williams*, 112 Ill. 91.

¹ *Railroad Co. v. Durant*, 95 U. S. 576; *Allen v. Withrow*, 110 U. S. 119; *Preacher's Aid Soc. v. England*, 106 Ill. 125.

² *Faulkner v. Faulkner*, 23 Ont. Rep. 252.

the plaintiff. The law creates both the privity and the promise.³

A near relationship between the promisee and the person who is to take a benefit under the contract was held in some early English cases to give the latter a right of action.⁴

A may represent B, in virtue of a contract of employment subsisting between them, so as to become his mouth-piece or medium of communication with C, and give both B and C rights as against each other. This employment constitutes agency and has been already treated.⁵

§ 355. *Several, Joint and Joint and Several Promisors.*

Promises made by more than one person may be (1) *several* or (2) *joint* or (3) *joint and several* and whether a contract is several, joint or joint and several is a question of construction, to find the intention of the parties. If the intent can be ascertained from the language of the agreement, it will be given effect to, but if this is not clear then all the circumstances of the case and the nature of the interests of the parties will be looked to.¹

1. Two or more persons may bind themselves severally for the same matter, so that the promisee is entitled to claim

³ Mellen v. Whipple, 1 Gray, 322; National Bank v. Grand Lodge, 98 U. S. 123; Taylor v. Taylor, 20 Ill. 650; Hosford v. Kanouse, 45 Mich. 620; Exchange Bk. v. Rice, 107 Mass. 37 Ante, chap. II.

⁴ Bourne v. Mason, 1 Vent. 6, where it was held that a daughter of a physician might sue upon a promise to her father to give her a sum of money if he performed a certain cure. But this doctrine was overruled in Tweddle v. Atkinson, 1 B. & S. 393. But it is in force in New York and some other states. Buchanan v. Tilden, 158 N. Y. 109, 52 N. E. 724; Lawrence v. Oglesby, 178 Ill. 122, 52 N. E. 945.

⁵ Ante, Chap. V.

¹ "The rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint." Parke B. in Sorsbie v. Park, 12 M. & W. 146, 13 L. J. (Ex.) 9.

the performance against each of them separately.² When a several promise is made by two or more in one instrument, it is the same as though each had executed separate instruments,³ and although they concern the same subject-matter, each promisor is liable only for his several promise, and cannot be held for the others.⁴ The case of a subscription paper to a common object where a number of persons promise to pay the sum opposite his name is a good illustration of a several promise, for although the paper generally reads, "We promise to pay," it would be absurd to hold that each subscriber intended to be liable for any subscription except his own.⁵ In *Beck v. Pounds*,⁶ a number of persons signed a paper reading, "We, the subscribers, agree to pay A B, teacher, \$16.50 per scholar at the expiration of the term" followed by the number of scholars entered by each. Said the court:

"That each employer designed to obligate himself to pay for the tuition of every other patron's pupils no one for a moment can believe. Such a conclusion would do violence to common sense as well as the common understanding of the country. Are they thus technically bound upon this paper? We think not."

A suit brought against one of several promisors on his promise is no bar to a subsequent suit against another, and suit may be brought against each promisor at the option

² *Lurton v. Gilliam*, 2 Ill. 577, 33 Am. Dec. 430; *Moffett v. Bowman*, 6 Gratt. (Va.) 219; *Payne v. Jelleff*, 67 Wis. 246, 30 N. W. 526; *Costigan v. Lunt*, 104 Mass. 217, *Leake Contr.* 454.

³ *Evans v. Sanders*, 10 B. Mon. 291; *Colt v. Learned*, 118 Mass. 380; *Costigan v. Lunt*, 104 Mass. 217; *Northumberland v. Errington*, 5 T. R. 522, *Leake Cont.* 371; *Bank v. Bear* (Mass.), 206 P. 902.

⁴ *Fisk v. Spang*, 43 Ill. (App.)

⁵ *Moss v. Wilson*, 40 Cal. 159; *Cornish v. Vest*, 82 Minn. 107; *Davis v. Bedford*, 70 Mich. 120; *Harlan v. Berry*, 4 Greene (Iowa) 212; *Ward v. Johnson*, 13 Mass. 148; *Duff v. Maguire*, 99 Mass. 300; *O'Connor v. Cooper*, 102 Cal. 528; *Combs v. Steele*, 80 Ill. 101; *Davis v. Barber*, 51 Fed. 148.

⁶ 20 Ga. 36; *McArthur v. Board*, 93 N. W. Rep. 580 (Ia.)

of the promisee.⁷ And the doctrine of survivorship which we shall presently see is an incident of joint promises does not apply to several promises,⁸ for on the death of one several promisor⁹ the liability on his promise descends to his heir or executor.

2. The law presumes (except in a clear case like a subscription paper) where two or more persons undertake an obligation, that they undertake jointly. Words of severance are necessary to overcome this primary presumption.¹¹ The use of such words as "we promise" "we agree" or "we undertake," imply a joint promise.¹²

Where the promise is joint each promisor is liable to the promisee for the whole debt or liability and none are bound separately.¹³ Hence all must be joined in the suit on the

⁷ Harlan v. Berry, 4 Greene (Iowa) 212; Ward v. Johnson, 13 Mass. 148.

⁸ Carthrae v. Brown, 3 Leigh (Va.) 98, 23 Am. Dec. 255; Enys v. Donnithorne, 2 Burr. 1190.

⁹ Howe v. Handley, 25 Me. 116; McCready v. Freedly, 3 Rawle 251; Collins v. Prosser, 1 B. & C. 682, 3 D. & R. 112, Leake Contr. 371.

¹¹ Boswell v. Morton, 20 Ala. 235; Eller v. Lucy, 137 Ind. 436, 36 N. E. 1088; Alpaugh v. Wood, 53 N. J. L. 638, 23 Atl. 261; Eichbaum v. Irons, 6 W. & S. 67; 40 Am. Dec. 546; Ripley v. Crooker, 47 Me. 370, 74 Am. Dec. 491; Elliott v. Bell, 37 W. Va. 834, 17 S. E. 399; City of Philadelphia v. Reeves, 48 Pa. St. 473. By statute in a number of states joint contracts or contracts which would have been joint by the common law are declared to be joint and several. Stimson Am. Stat. of L., § 4113.

¹² McCullis v. Thurston, 27 Vt. 596; New Haven, etc., Co. v. Hayden, 110 Mass. 361; Barritt v. Juday, 38 Ind. 86. "If two, three or more bind themselves in an obligation thus, *obligamus nos*, and say no more, the obligation is, and shall be taken to be joint only, and not several." Shep. Touch. 375.

¹³ Streicham v. Fehleisen, 112 Ia. 612, 84 N. W. 715; Allin v. Shadburne, 1 Dana 68, 25 Am. Dec. 121; Field v. Runk, 2 N. J. L. 525; Ripley v. Crooker, 47 Me. 370, 74 Am. Dec. 491; Eichbaum v. Irons, 6 W. & S. 67, 40 Am. Dec. 540; O'Brien v. Bound, 2 Speer, 495, 42 Am. Dec. 384; Meyer v. Estes, 164 Mass. 457, 41 N. E. Rep. 683; Dumanoise v. Townsend, 80 Mich., 302, 45 N. W. 179; Alpaugh v. Wood, 53 N. J. L. 638, 23 Atl. 261.

debt.¹⁴ But if one only or in the case of more than two promisors less than all are sued and the defendants do not object and judgment is obtained against less than all, this is a discharge of the others,¹⁵ the reason for this being that on a joint promise there is only one cause of action.¹⁶

“There is in the cases of joint contract and joint debt, as distinguished from the cases of joint and several contract and joint and several debt, *only one cause of action*. The party injured may sue at law all the joint contractors, or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, or continued against one debtor or against all the debtors, it is for the same cause of action—*there is only one cause of action*. If we grasp this we shall be able to answer, not all, perhaps, but many of the difficult questions which arise on this branch of the law; we shall see, for instance, why a judgment against one of two or more joint debtors is a bar to an action against the other or others, as it is. There is but one cause of action on the joint debt, and that is merged in the judgment. Also why a release of one of two joint debtors releases the other, as is also the case.”¹⁷

But the causes of action and the parties must be the same. In a recent English case, E and F jointly guaranteed to plaintiff the payment of rent. The rent not being paid, the plaintiff took a check from F which was dishonored. The plaintiff then sued F on the check and recovered judgment.

¹⁴ Page v. Brant, 18 Ill. 37; Eller v. Lacy, 137 Ind. 436, 36 N. E. 1088; Rinley v. Crooker, 47 Me. 370, 74 Am. Dec. 491; Van Leyen v. Wreford, 81 Mich. 606, 45 N. W. 1116; Smith v. Miller, 49 N. J. L. 521, 13 Atl. 39; Clements v. Miller, 100 N. W. 239 (N. D.); O'Brien v. Bound, 2 Speers, 495, 42 Am. Dec. 384. By statute in some states the action may be brought against all or any of the joint promisors.

¹⁵ Mason v. Eldred, 6 Wall. 231; King v. Hoare, 13 M. & W. 494; Sessions v. Johnson, 95 U. S. 347.

¹⁶ King v. Hoare, 13 M. & W. 494; Beckett v. Ramsdale, 31 Ch. Div. 177. See note in 1 A. L. R. 1601, pointing out that this rule has been changed by statute in many states.

¹⁷ Griffith, Joint Rights and Liabilities 22. See *post* as to release of joint debtors.

But the judgment not being paid he sued E on the guarantee, and it was held that he could recover; the court saying:

“A judgment on the joint cause of action against the joint contractors is a totally different thing from a judgment on a several cause of action that exists against one of them only. There was a separate cause of action against F on the check which is entirely distinct from the joint cause of action against the two guarantors. In order that the doctrine of merger may apply the cause of action must be the same in each case, *i. e.*, not only must they be concerned with the same subject-matter but the parties to them must be the same.”¹⁸

At common law upon the death of one joint promisor the liability on the contract devolved on the survivor or survivors and he and his estate were discharged.¹⁹ But the Court of Chancery, Lord Hardwicke, Chancellor, refused to follow this rule. Said he:

“There was a case which I determined in this court, where there were two persons jointly bound in a bond; one of the obligors died, and, to be sure, at law it might have been put in suit against the survivor; but *as I thought it extremely hard*, I decreed the representative of the co-obligor should be charged *pari passu* with the surviving obligor in payment of the bond.”²⁰

It cannot be said however that a joint contract will always be treated in equity as a joint and several one—this will be done only when there is some equitable reason for so treating

¹⁸ Wegg Prosser v. Evans, 1 Q. B. Div. 116 (1895); Coal Co. v. Jewelry Co. (Mo.), 237 S. W. 849.

¹⁹ Towers v. Moore, 2 Vern. 98; Moore v. Rogers, 19 Ill. 347; Brown v. Benight, 3 Blackf. 39, 23 Am. Dec. 373; New Haven, etc., Co. v. Hayden, 119 Mass. 361; Ayer v. Wilson, 2 Mill. 319, 12 Am. Dec. 677; Atwell v. Milton, 4 Hen. & M. 253; Murphey v. Weil, 92 Wis. 467, 66 N. W. 532; U. S. v. Cushman, 2 Sumn. 426. By statute, in a number of states, in case of the death of one or more joint promisors, the joint debt survives against the heirs or administrators as well as against the others.

²⁰ Primrose v. Bromley, 1 Atk. 88; Townshend v. Roof (Mo.), 237 S. W. 189.

it.²¹ For example where money is loaned to two who give a joint obligation for its repayment, equity will enforce the obligation against the representatives of the deceased obligor on the ground that "the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but, through fraud, ignorance, mistake or want of skill failed to accomplish their object." ²²

"The principle upon which this rule of equity was founded in the first instance may not perhaps be satisfactory. From expressions of Lord Thurlow²³ and Lord Eldon, one may gather that such a doctrine would not have originated with them. Where parties think proper to enter into a joint instead of a joint and several contract, one is surprised that courts of equity have not left that to its fate as a joint contract, and allowed the contractor who has had to pay to seek his remedy in his right of contribution against the estate of the deceased contractor. The want of any sound basis for this rule led the judges to refer it to the nearest known principle which was available, namely, to the doctrine of mistake." ²⁴

3. In the case of a joint contract, as we have seen, there is but one cause of action while a joint and several contract, though it is written on the same paper, comprises the joint promise of all the promisors and the several promises of each of them; therefore in a joint and several contract there is one more promise than there are promisors.²⁵ "We bind ourselves and each of us" expresses clearly a joint and several

²¹ *Harriman Contr.* 139, *U. S. v. Price*, 9 How. 83; *Richardson v. Horton*, 6 Beav. 185.

²² *Pickersgill v. Lahens*, 15 Wall. 140.

²³ *Hoare v. Cowntencin*, 1 Brown 27; *ex parte Kendall*, 17 Vesey, 514.

²⁴ *Griffith*, Joint Rights and Liabilities, 49; *Master v. Bidler* (Or.), 198 P. 912.

²⁵ *People v. Harrison*, 82 Ill. 84; *Turner v. Whitmore*, 63 Me. 526; *Hemmenway v. Stone*, 7 Mass. 58, 5 Am. Dec. 27; *Klapp v. Kleckner*, 3 W. & S. 519; *U. S. v. Cushman*, 2 Sumn. 426.

obligation.²⁶ So does a note signed by two but reading, "I promise to pay."²⁷ As the joint and several obligation gives not one but many causes of action to the promisee it follows that though he may have obtained judgment against one, yet he may sue the other or others until he gets satisfaction.²⁸ "The rule is elementary that when an obligation is joint as well as several, all must be proceeded against jointly, or each severally. There is no authority for suing three out of four joint makers."²⁹ This would be treating the contract as neither joint or several. It is laid down by the Supreme Court of the United States that if the plaintiff obtains a joint judgment, he cannot afterwards sue them separately, for the contract is merged in the judgment; nor can he maintain a joint action after he has recovered judgment against one in a separate action, as the prior judgment is a waiver of his right to pursue a joint remedy.³⁰ But it is held in Illinois that the legal effect of such a contract being double equivalent to independent contracts founded upon one consideration, for performance severally and also for performance jointly, distinct remedies upon the same instrument, treating it as a joint contract and as a several contract, may be pursued until satisfaction is fully obtained.³¹ And a release of one releases the others.

²⁶ *Carter v. Carter*, 2 Day. 444, 2 Am. Dec. 113; see *Gwinn v. McDaniel*, 5 Tex. Civ. App. 112, 23 S. W. 850; *Davis v. Shafer*, 59 Fed. 764.

²⁷ "The letter 'I' applies to each severally." *March v. Ward, Peake*, 130.

²⁸ *Higgins Case*, 6 Rep. 44; *Lechman v. Fletcher*, 1 Cr. & M. 623; *People v. Harrison*, 82 Ill. 84; *Costigan v. Lunt*, 104 Mass. 217; *U. S. v. Cushman*, 2 Sumn. 426. 310. "If three be bound jointly and severally in a bond, the obligee cannot sue two of them only, but he must either sue them all or each of them separately. And though that doctrine has been several times questioned, yet it has been held good law from the time of Lord Coke." *Streatfield v. Halliday*, 3 T. R. 779, 782; *Stevens v. Catlin*, 152 Ill. 56.

²⁹ *Fay v. Jenks*, 78 Mich. 312; *Bangor Bk. v. Treat*, 6 Me. 207.

³⁰ *Sessions v. Johnson*, 95 U. S. 347.

³¹ *Moore v. Rogers*, 19 Ill. eru; *People v. Harrison*, 62 Ill. 84.

“It might be argued with force that a release of one intended to release only the several liability of that one and not the joint liability under which he with others lay. It is conceived that this result might be attained by a proper form of words, but if a debtor being liable severally and also jointly with others is released *simpliciter* it is presumed that his whole liability, joint as well as several, is intended to be released, and we have seen that if one joint debtor is released, the other joint debtors are released also. But where parties are jointly and severally liable the several liability may by a proper form of words be preserved, though the joint liability is released.”³²

A contract will be construed to be joint or several, according to the interests of the parties, if the words are capable of that construction or not inconsistent with it. If the words are ambiguous, it will be considered joint if the interests are joint and several if the interests are several.³³

§ 356. *Several, Joint and Joint and Several Promisees.*

Different rules of law govern promisees from those which govern promisors. An obligation as we have seen may be undertaken by two or more persons severally, or jointly, or jointly and severally. But while a right may belong to two or more severally or jointly it cannot belong to them jointly and severally.¹

(a) One may make a promise in the same instrument to two or more so that each of them is separately entitled to sue for the promise. Thus if A agrees to pay B and C each \$100, either A or B may sue without joining the other and

³² Griffith, Joint Rights and Liabilities 38.

³³ Int. Hotel Co. v. Flynn, 238 Ill. 636, 87 N. E. 855.

¹ Harriman, Contr., 137; Slingsby's Case, 5 Coke 19a, 18b; Keightley v. Watson, 3 Exch. 716; Starret v. Gault, 165 Ill. 99, 46 N. E. 220; Capen v. Barrows, 1 Gray 376; Robbins v. Ayres, 10 Mo. 538, 47 Am. Dec. 125. “One and the same contract, whether it be a simple contract or a contract under seal cannot be so framed as to give the promisees or covenantees the right to sue upon it, both jointly and separately.” Dicey, Parties, 110.

a payment of B's claim would not discharge A's promise to C.²

(b) Where a promise is made to several jointly all must join in enforcing it,³ and upon the death of one the right of action rests in the survivors.⁴ This is so even though their interests may be several.⁵

“A promise by two or more persons to perform an act is a promise that they or some one of them will perform it; but a promise to two or more persons to perform an act is not a promise to them or some or one of them, but a promise to them all, to perform it. In the former case the promise may be performed by one, in the latter case the promise cannot be enforced by one. In the former case the parties to the agreement contemplate that the obligation may be discharged by one, for a man who agrees in conjunction with others to pay A a sum of money does not agree with A that he will only pay the sum in such conjunction and not otherwise; his agreement with A is to pay the money, either with the others or, if they will not join, without them; in fact, as between him and A the material part of the agreement is that which provides for the payment, not that which provides for the association of the debtors. It is only to secure the payment that this association is material to A, to whom the payment is the end and the association only a means to that end. . . . The case of an agreement by one person to pay a sum to two is very different. It is clear that an obligation to pay a debt to the joint account of two or more persons does not involve an alternative obligation to pay it to the separate account of any. True it seems to be the law that payment to

² *Burton v. Henry*, 90 Ala. 281, 7 South. Rep. 925; *Rorabacher v. Lee*, 16 Mich. 169; *Hall v. Leigh*, 8 Cranch 50. A note “I promise to pay Washington or Joseph Willoughby” is construed as joint, “or” being read as “and.” *Willoughby v. Willoughby*, 5 N. H. 244; *Townshend v. Roof* (Mo.), 237 S. W. 189.

³ *Slaughter v. Davenport*, 151 Mo. 26, 51 S. W. Rep. 471; *Marie v. Garrison*, 83 N. Y. 14; *Angus v. Robinson*, 59 Vt. 585, 59 Am. Rep. 788; *Clark v. R. Co.*, 81 Fed. Rep. 282. But the doctrine of survivorship applies to joint promisees as well as to joint promisors. *Beehe v. Miller*, Minor, 364; *Trammell v. Harrell*, 4 Ark. 602; *Jell v. Douglass*, 4 B. & Ald. 374.

⁴ *Crocker v. Beall*, 1 Lowell 416; *Donnell v. Mason*, 109 Mass. 576.

⁵ *Clapp v. Pawtucket Ins.*, 15 R. I. 489.

one of three may be pleaded as payment to the three, even when made to the separate account of the one and in fraud of the others.⁶ The reason seems to be that one who has been paid cannot sue again, and the others cannot recover without him. This, however, leaves intact the distinction between an obligation to one and an obligation to several.’’⁷

⁶ *Myrick v. Dame*, 9 Cush. 248; *Napier v. McLeod*, 9 Wend. 120; *Wilkinson v. Lindo*, 7 M. & W. 81; *Nabors v. Producers Oil Co.*, 140 La. 985, 74 South, 527.

⁷ *Griffith, Joint Rights and Liabilities*, 2.

CHAPTER IX.

THE ASSIGNMENT OF THE CONTRACT.

Section 357. Introductory.

(A) Assignment by Act of Parties.

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- 359. Assignment of Rights.
- 360. What May Not be Assigned.
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- 362. Rule in Equity.
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(B) Assignment by Operation of Law.

- 372. Assignment by Marriage.
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- 375. Interests in Lands.
- 375a. Interests in Business.

§ 357. *Introductory.*

We have seen that the common law rule was that no one but the parties to a contract could be bound by it or entitled to claim rights under it.¹ Nevertheless, the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, and thus what is called Assignment may take place by (a) the act of the parties, or (b) by operation of law.

¹ Ante, chap. VIII.

(a)

ASSIGNMENT BY ACT OF PARTIES.

§ 358. *Assignment of Liabilities.*

A liability under a contract cannot be assigned to another, and a person cannot be compelled to accept performance of the contract from one who was not a party to it. This rule rests upon the ground that "you have a right to the benefit you contemplate from the character, credit and substance of the person with whom you contract."¹ Thus A owes B \$100, A cannot assign his debt to C so as to make B collect his debt from C and not from A.² So, if A agrees to do a certain piece of work for B requiring skill, B cannot be compelled to accept performance from C, to whom A has assigned the contract.³ Yet, if A undertakes to do a thing for B which needs no special skill and A was not selected on account of any personal qualification—as for example a contract to roof a building or to drill a well⁴—B cannot complain if A gets the thing done by an equally competent person,⁵ A continuing liable to B if the thing was not properly done.⁶ A contract between a corporation and one S to sell S

¹ *Humble v. Hunter*, 12 Q. B. 317; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13; *La Rue v. Groezinger*, 84 Cal. 281; *Arkansas Valley Smelting Co. v. Belden Co.*, 127 U. S. 379.

² *Jones v. Walker*, 2 Paine, 687; *Van Scotter v. Leffetts*, 11 Barb. 140; *Cannon v. Kreipe*, 14 Kan. 324.

³ *Robson v. Drummonds*, 2 B. & Ad. 303. Where the creditor consents at the debtor's request to accept another person as his debtor in the place of the first, there is not any assignment, but the rescission, by agreement, of the contract and the substitution of a new one in which the same acts are to be performed by different persons. It is called in law a novation. See post.

⁴ *Curran v. Clifford*, 40 Pac. 477 (Colo.); *Galey v. Mellon*, 172 Pa. St. 4+3, 33 Atl. 560; *Cormack v. Teal*, 49 S. E. (Ga.) 806.

⁵ *Anson Contr.*, 219; *British Wagon Co. v. Lea*, 5 Q. B. Div. 149.

⁶ *Rochester Lantern Co. v. Stiles*, 135 N. Y. 209; *Devlin v. Mayor*, 63 N. Y. 8; *La Rue v. Groezinger*, 84 Cal. 281.

paper hangings was held assignable by S to another company, *although it was provided* that S should settle all bills within 30 days from shipment. The court said:

“The contract is not a personal one in the sense that S was bound to perform in person. S had a right to assign the contract, or in case of his death his executors or administrators would have succeeded to his rights and liabilities under the contract. The obligations of S under the contract could have been discharged by anyone. If the assignment was made without the consent of the plaintiff, the obligations of the contract would still have rested upon S, and resort could have been had to him for the fulfillment of the contract if the same had not been carried out and discharged by his assignee.”⁷

§ 359. *Assignment of Rights.*

According to Coke, the origin of the rule that the benefit of a contract—*i. e.*, the right of one party to have the other perform an obligation on his part arising therefrom—could not be assigned at common law, so as to enable the assignee to sue in his own name for a breach thereof, was the “wisdom and policy of the founders of our law in discouraging maintenance and litigation.” In the view of a modern writer¹ it was a logical consequence of the primitive view of a contract as creating a strictly personal obligation between the creditor and the debtor. Under this conception of a contract, the relation created by it cannot be severed by either party thereto, the creditor or debtor, without the consent of the other. It is as impossible for either to substitute another in his place as it is for him to change any other term of the contract. This primitive view of a contract prevails no longer. The treatment by courts of equity of such assignments, the judicial cognizance by courts of law of the usage of merchants in relation to bills of exchange rendering it a part of the

⁷ *Liberty Wall Paper Co. v. Stoner Co.*, 59 N. Y. App. Div. 353, 170 N. Y. 582; *Willingham v. Glover* (Ga.), 111 S. E. 206.

¹ Pollock, *Contr.*, 201.

common law, the statutes making certain contracts assignable, the statutes requiring actions to be brought in the name of the real party in interest, and the conception of such rights as property and the possession thereof as ownership, account for its passing away.²

“At the present day an agreement to pay money or to deliver goods may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. ‘Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party, whose agreement conferred those rights, must have intended them to be exercised only by him in whom he actually confided.’ ”³

§ 360. *What Rights May Not Be Assigned.*

A contract for personal service involving a personal relation or confidence between the parties cannot be assigned.¹ As for example an agreement between author or publisher² or

² American Bonding Co. v. R. Co., 124 Fed. 866; Richmond-Chase Co. v. Schlessinger (Cal.), 203 P. 418.

³ Arkansas Smelting Co. v. Belden Co., 127 U. S. 379; Poling v. Condon Land Co., 47 S. E. Rep. 279 (W. Va.).

¹ Hayes v. Willio, 4 Daly, 259; Davenport v. Gentry, 9 B. Mon. 427; Chaplin v. Longworth, 31 Ohio St. 421; Bethlehem v. Annis, 40 N. H. 74; Mueller v. Northwestern Univ., 195 Ill. 236, 63 N. E.; Standard S. M. Co. v. Smith, 51 Mont. 245, 152 Pac. 38; Griffith v. Tower Pub. Co., 1 Ch. 21 (1897).

² Gibson v. Carruthers, 8 M. & W. 343; Stephens v. Benning, 1 Kay & J. 168.

lawyer and client³ or an agreement by a child to support a parent⁴ or a contract by A to teach B.⁵

And the same is true where the rights are coupled with liabilities. In *Lansden v. McCarthy*⁶ one M entered into a written agreement with B & Co., by which he agreed to furnish all the meat B & Co. should require for their hotel for the next year at a certain rate per pound; B & Co. agreeing to pay for the meat so furnished promptly at the end of each month. B & Co. assigned the contract to L, who demanded performance which M refused. It was held that L had no right to demand performance of the agreement.

“The plaintiff L’s counsel admit the proposition that where an executory contract is founded upon trust and confidence reposed in the character and skill of a particular person, as

³ *Sloan v. Williams*, 138 Ill. 43, 27 N. E. Rep. 531; *Baxter v. Billings*, 83 Fed. 790.

⁴ *Lathrop v. Mayer*, 86 Mo. (App.) 355; *Jenkins v. School* (W. Va.), 110 S. E. 560.

⁵ *Butts v. McMurray*, 74 Mo. (App.) 530.

⁶ 45 Mo. 106; *Hardy Impl. Co. v. Iron Works*, 129 Mo. 222. In *Tolhurst v. Associated Port. Cement Co.*, A. C. 414 (1903), the owner of chalk quarries undertook to supply a company with 750 tons of chalk per week, and so much more, if any, as the company should require for the whole of their manufacture of cement upon their land, and to provide all rolling stock, stipulating that the agreement should not preclude him from supplying chalk from his quarries to other persons. Subsequently, the company conveyed their land, works and business, and assigned the benefit of the agreement to a new company having a much larger manufacture, giving notice of the conveyance and assignment to the owner of the quarries. The House of Lords held that the contract was assignable and that an action could be maintained by the new company against the owner of the quarries for breach of the agreement to supply chalk. This case was distinguished in *Kemp v. Baerschman*, 2 K. B. 604 (1906), in which the defendant contracted with K., a cake manufacturer, to supply him with all the eggs of a specified quality “that he shall require for manufacturing purposes for one year,” K. undertaking not to purchase eggs from any other merchant during the year, so long as the defendant was ready to supply them. During the year K. transferred his business to a company, whereupon the defendant refused to supply any more eggs either to K. or to the company. The Court of Appeals held that the defendant’s contract was with K. personally; that the benefit of it was not assignable; and that the defendant was discharged from his obligation.

where an author contracts to write a book, or an artist contracts to paint a picture, the contract is not assignable by the party in whom such trust and confidence is reposed. The principle involved in this concession is fatal to L's case; for M's estimate of the solvency and pecuniary credit and standing of B & Co., may have constituted an important inducement to the contract, without which he never would have entered into it. There was a credit given. The meat was not to be paid for on delivery, but at the end of the successive months, involving credit to an indefinite amount. The amount of meat to be furnished during any given month was not optional with M but was to be determined by the hotel proprietors, in view of the wants and convenience of the hotel. The contract imposed no obligation upon M to accept as his debtors any other parties than those with whom he contracted. Nor was he under any obligation to experiment for a month, and determine at the end of it whether he would go on with the contract, according as he should or should not succeed in securing prompt payment. He was willing to give B & Co. credit; but it does not thence follow that he was willing to give credit to L even for a month or any part of it. Whether or not he would do so, was a question for him alone to determine. He could not be forced into it against his will, by an assignment of the contract, without his consent."

But although a man has a right to say for whom he will work and under a contract to work for one person or company, he cannot be required to work for a different one,⁷ yet where the man consents, the contract of assignment of his services is not against public policy, nor does it amount to "involuntary servitude" under the Constitution.⁸

And the parties may prohibit the assignment of any contract, and declare that neither personal representatives nor assignees shall succeed to any right in virtue of it, or be bound by its obligations.⁹

⁷ *Globe Ins. Co. v. Jones*, 129 Mich. 664, 89 N. W. 580.

⁸ *Augusta Base Ball Assn. v. Thomasville Base Ball Club*, 93 S. E. 208 (Ga.).

⁹ *Devlin v. Mayor*, 63 N. Y. 8.

§ 361. *Choses in Action Not Assignable at Common Law.*

At common law a *chose in action*, i. e., the right which a person possesses under a contract, could not be assigned so as to enable the assignee to sue upon it in his own name. This rule was based not only on the old view of a contract as creating a strictly personal obligation between the parties, but on the policy of the law to discourage maintenance and litigation.¹ But at an early day a plan was devised by which this could be done, viz., by a power of attorney authorizing the proposed transferee to enforce the claim in the name of his principal. The modern written assignment soon took the place of this, but did not pass the legal title; it only empowered the assignee to sue in the assignor's name.² But the assignee had to sue in the name of the assignor or his representatives,³ unless the debtor had expressly promised the assignee to be responsible to him.⁴

“The general principle deducible from the cases and from the ordinary practice is that when one person has an equitable right or claim against another, which he can obtain only by a suit in the name of a third person, he may use the name of that person in an action to enforce his right. And such third person cannot control the suit, nor will his admission, subsequent to the time he ceased to have an interest, be evidence to defeat it. But the holder must furnish to the plaintiff on the record ample indemnity against costs, if required.”⁵

¹ Pollock Contra., 207; Beecher v. Buckingham, 18 Conn. 110, 44 Am. Dec. 580.

² Caister v. Eccles, 1 Ld. Ray, 683; McWilliam v. Webb, 32 Iowa 577; Hailoran v. Whitcomb, 43 Vt. 306; Fay v. Guynon, 131 Mass. 31.

³ Skinner v. Somes, 14 Mass. 107.

⁴ Crocker v. Whitney, 10 Mass. 316; Jessel v. Williamsburg Ins. Co., 3 Hill, 88; Compton v. Jones, 4 Cow. 13.

⁵ Parker, C. J., in Webb v. Steele, 13 N. H. 230, 236; Halloran v. Whitcomb, 43 Vt. 306; Fay v. Guynon, 131 Mass. 31; Hough v. Barton, 20 Vt. 455; New York, etc., v. Memphis Water Co., 107 U. S. 205.

§ 362. *Rule in Equity.*

The strict rule of the common law was not followed in courts of equity, which always allowed the assignment of a *chose in action* (where the contract was not of a personal character) and the bringing of the suit by the assignee in his own name.¹

(a) *Part of Claim.* And while at law the assignment of a part of a claim was not allowed, because the debtor had a right to discharge his debt in full at one time and not in parcels,² in equity an assignment of part of a demand was good, even without the consent of the debtor.³

(b) *Things in Futuro.* So while at law an assignment to be valid must be of a thing which at the time has an actual

¹ *Smith v. Brittain*, 3 Ired. Eq. 347, 42 Am. Dec. 175; *Tibbits v. Gerresh*, 25 N. H. 41, 57 Am. Dec. 307; *Casket Co. v. Wheeler* (N. C.), 109 S. E. 378.

² *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423; *Palmer v. Merrill*, 6 Cush. 257, 52 Am. Dec. 782; *Miller v. Bledsoe*, 1 Ill. 530, 32 Am. Dec. 37; *St. Louis Bk. v. Noonan*, 88 Mo. 372; *Knowlton v. Cooley*, 102 Mass. 234; *Carter v. Nicholas*, 58 Vt. 513. "The reason for the legal doctrine is obvious. The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one creditor for another. But if assigned in fragments, the debtor has to deal with a plurality of creditors. If his liability can be legally divided at all without his consent, it can be divided and subdivided indefinitely. He would have the risk of ascertaining the relative shares and rights of the substituted creditors. He would have, instead of a single contract, a number of contracts to perform. A partial assignment would impose upon him burdens which his contract does not compel him to bear." *Exchange Bk. v. McLean*, 73 Me. 498, 40 Am. Rep. 388.

³ *Grain v. Aldrich*, *supra*; *Field v. Mayor*, 6 N. Y. 179, 57 Am. Dec. 435; *James v. City of Newton*, 142 Mass. 368, 56 Am. Rep. 692; *Trist v. Child*, 21 Wall. 477; *Risley v. Bank*, 83 N. Y. 329, 38 Am. Rep. 421. "In a court of equity the objections to a partial assignment of a demand which are formidable in a court of law, disappear. In equity the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risk as to its proper distribution." *Exchange Bk. v. McLean*, *supra*.

potential existence,⁴ courts of equity will support assignments of things which have no present actual existence, but rest in possibility only,⁵ as for example an interest in the estate of a living ancestor,⁶ or an expected lagacy,⁷ or a right to insurance money under a policy before any loss has occurred,⁸ or rent yet to become due,⁹ or wages or compensation to be earned under an existing contract.¹⁰

§ 363. *Notice of Assignment Necessary.*

Though the assignment is effectual as between assignor and assignee from the moment it is made, it does not bind the person liable until he has received notice of it. He has a right to know to whom his liability is due, and if he receives no notice that it is due to another than the party with whom he originally contracted, he is protected in any payment he

⁴ *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Thallheimer v. Brinckerhoff*, 3 Cow. 623, 15 Am. Dec. 309; *Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 646. As to assignment of future accounts see note to *Taylor v. Barton Child Co.*, 228 Mass. 126, 117 N. E. 45, in L. R. A. 1918 A. 126.

⁵ *Field v. Mayor*, 6 N. Y. 179, 57 Am. Dec. 435; *Payne v. Mayor*, 4 Ala. 383, 37 Am. Dec. 744; *Brackett v. Blake*, 7 Met. 335, 41 Am. Dec. 442.

⁶ *McDonald v. McDonald*, 5 Jones (Eq.) 21, 75 Am. Dec. 433.

⁷ *Bacon v. Bonham*, 33 N. J. (Eq.) 614.

⁸ *Bibbends v. Ins. Co.*, 34 Cal. 86; *Bergson v. Ins. Co.*, 38 Cal. 541.

⁹ *Demarest v. Willard*, 8 Conn. 206.

¹⁰ *Garland v. Harrington*, 51 N. H. 407; *Augur v. New York Belt-ing Co.*, 39 Conn. 536; *Mulhall v. Quinn*, 1 Gray, 105, 61 Am. Dec. 414; *Thayer v. Kelly*, 28 Vt. 19, 65 Am. Dec. 220; *Rodgers v. Tor-rent*, 111 Mich. 680, 70 N. Rep. 335; *Duluth R. Co. v. Wilson*, 167 N. W. 55 (Mich.). But the assignment is not good in equity when there is no contract at the time it is made. *Mulhall v. Quinn*, 1 Gray, 108, 61 Am. Dec. 414; *Hazell v. Tipton Bank*, 95 Mo. 60, 6 Am. St. Rep. 22. The distinction between the cases in which the wages are not earned under a contract existing at the time of the assignment, and those in which they are, is said to be that "in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent, and liable to be defeated, is a vested right." *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357.

may make to his original creditor.¹ The debtor is liable at law to the assignor of the debt, and at law must pay the assignor if the assignor sues in respect of it. If so, it follows that he may pay without suit. The payment of the debtor to the assignor discharges the debt at law.

“The assignee has no legal right, and can only sue in the assignor’s name. How can he sue if the debt has been paid? If a court of equity laid down the rule that the debtor is a trustee for the assignee, without having any notice of the assignment, it would be impossible for a debtor safely to pay a debt to his creditor. The law of the court has therefore required notice to be given to the debtor of the assignment *in order to perfect the title of the assignee.*”²

And the rule that the assignment of a chose in action is not complete, so as to vest the title absolutely in the assignee, until notice of the assignment to the debtor, applies not only as regards the debtor, but likewise as to third persons. And, therefore, as between successive purchasers or assignees of a chose in action, he is entitled to preference who first gives notice to the debtor, although his assignment be subsequent to that of the other.³

¹ *Judson v. Corcoran*, 17 How. 612; *Van Keuren v. Corkins*, 66 N. Y. 77; *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240; *Van Buskirk v. Ins. Co.*, 14 Conn. 141, 36 Am. Dec. 473; *Muir v. Schenck*, 3 Hill, 228, 38 Am. Dec. 633; *Gaullagher v. Caldwell*, 22 Pa. St. 300, 60 Am. Dec. 85; *Merchants Bank v. Hewitt*, 3 Iowa 93, 66 Am. Dec. 49; *Dodd v. Brott*, 1 Minn. 270, 66 Am. Dec. 541.

² *Stocks v. Dobson*, 4 D. M. & G. 15; *Hermans v. Ellsworth*, 64 N. Y. 159.

³ *Judson v. Corcoran*, 17 How. 615; *Van Buskirk v. Ins. Co.*, 14 Conn. 141, 36 Am. Dec. 473; *Clodfelter v. Cox*, 1 Sneed, 330; 60 Am. Dec. 157; *Murdock v. Finney*, 21 Mo. 138. In some states a contrary doctrine obtains and it is held that equitable assignments have priority not according to priority of notice but according to priority of time, and that as to all persons, save the debtor, the assignment of a chose in action is complete in itself, and vests a perfect title in the assignee, as against third persons, without notice of the assignment to the debtor and that the purchaser can take no rights which his assignor did not possess. *Muir v. Schenck*, 3 Hill 288, 38 Am. Dec. 633; *Moore v. Metropolitan Bk.*, 55 N. Y. 41;

§ 364. *Form of Notice.*

The notice of the assignment need not be given in writing or in any formal manner; it is enough that the debtor has such knowledge of facts and circumstances as should be sufficient to put him on inquiry as to who is the real creditor.¹

§ 365. *Assignee Takes Subject to Equities.*

The meaning of the rule that an assignee of a chose in action takes it subject to equities is that if a person takes an assignment of a chose in action, he must take his chances as to the exact position in which the party giving it stands, for the assignor can give no better right than he himself had.¹ Thus, suppose a debt is due from B to A, but there is also a debt due from A to B which B might set off in an action by A, or B has paid a portion of the debt to A. If under these circumstances A assigns the debt to C without telling him of the set-off or of the part payment, B will be entitled to set them up as against C.² Or suppose B has contracted to pay A a certain sum of money, but the contract is voidable on the ground of fraud or misrepresentation, or there is any other ground for setting it aside or rectifying it as against the creditor A. A assigns the contract to C who does not know the circumstances that render it voidable. Here B may avoid the contract as against C.³

As to whether the assignee takes the chose in action subject

Putnam v. Storey, 132 Mass. 205; Summers v. Huston, 48 Ind. 230; Tingle v. Foster, 20 W. Va. 507; Kamena v. Huelbig, 23 N. J. (Eq.) 78; Willis v. Cons. Co. (Tenn.), 236 S. W. 282.

¹ Anderson v. Van Alen, 12 Johns, 343; Barron v. Porter, 44 Vt. 587; Kellogg v. Krauser, 14 S. & R. 137, 16 Am. Dec. 480; Exchange v. Lowney Co. (Vt.), 115 A. 507.

² 4 Cyc. 1.

³ Hooper v. Brundage, 22 Me. 460; Hunt v. Shackelford, 55 Mass. 94; Bank v. Bynum, 84 N. C. 24; Wood v. Mayor, 73 N. Y. 556; McKenna v. Kirkwood, 50 Mich. 544.

³ Graham v. Johnston, L. R. 8 (Eq.) 36; Holbrook v. Burt, 22 Pick. 546; Woodson v. Barrett, 2 Hen. & M. 80, 3 Am. Dec. 612.

to what are called "latent equities," *i. e.*, the equities of a prior assignor or a third person is a question upon which the authorities are not agreed.⁴

§ 366. "*Equities*" *Excluded by Contract or Conduct.*

It is perfectly legal for two parties to a contract to stipulate that if either assign his rights under it, such an assignment shall be "free from equities;" that is to say, that the assignee shall not be liable to be met by such defenses as would have been valid against his assignor.¹ But it has been questioned, whether such a stipulation would protect the assignee against the effects of fraud, or any vital defect in the formation of the original contract.²

And the debtor may by his conduct estop himself from setting up any right or equities against the assignee;³ as, for example, where the debtor induces the assignee to take the instrument by declaring that he has no defense to it, he cannot afterwards set up any defense.⁴ So a bona fide purchaser of a chose in action not negotiable, from one to whom the owner has assigned the apparent absolute ownership, who purchases upon the faith of such ownership, obtains a valid title as against such owner, although the assignee had not such title.⁵

⁴ See *Anson Contr.* 225; *Bush v. Lathrop*, 22 N. Y. 535; *Bloomer v. Henderson*, 8 Mich. 395; *Sumner v. Waugh*, 56 Ill. 531.

¹ *Ex parte Asiatic Bank*, L. R. 2 Ch. 391.

² *Anson Contr.* 224.

³ *Wordson v. Barrett*, 2 H. & M. 80, 3 Am. Dec. 612.

⁴ *Hardin v. Helton*, 50 Ind. 323; *Weaver v. Lynch*, 25 Pa. St. 449, 64 Am. Dec. 713; *Scott v. Sadler*, 52 Pa. St. 214.

⁵ *Moore v. Met. Nat. Bk.*, 55 N. Y. 41, 14 Am. Rep. 173; *Coombs v. Chandler*, 33 Ohio St. 178; *Cowdrey v. Vandeburgh*, 101 U. S. 572; *Cochran v. Stewart*, 21 Minn. 435; *International Bk. v. German Bk.*, 71 Mo. 183.

§ 367. *Debtor's Assent Immaterial.*

The assignment binds the debtor without any assent on his part and even when he expressly dissents.¹ Thus where the defendant received express notice of the assignment of a debt accruing from him to the assignor, but refused to be bound by the assignment and paid his debt to the assignor, he was nevertheless held liable to the assignee for the amount assigned.²

§ 368. *What Passes on Assignment.*

An assignment of a debt carries with it all collateral securities which the creditor may hold for its enforcement,¹ and all the remedies which the assignor had.² Thus the assignment of a bond or a promissory note secured by a mortgage or deed of trust carries with it these securities.³ And the assignment of the principal carries with it the interest on the debt.⁴

§ 369. *Liability of Assignor.*

The assignor of a chose in action impliedly warrants that he has a good title to it,¹ and the assignor of a bond impliedly covenants that he has a right to transfer what his assignment purports to pass.² But there is no implied war-

¹ Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515; Hall v. Ins. Co., 111 Mass. 53, 15 Am. Rep. 1.

² Brice v. Banister, 3 Q. B. Div. 569.

³ Lindsey v. Bates, 42 Miss. 397; Waller v. Tate, 4 B. Mon. 529; Hurt v. Wilson, 38 Cal. 263.

⁴ Morris v. McCulloch, 83 Pa. St. 34; Carlton v. Buckner, 28 Ark. 66; Strother v. Hamburg, 11 Ia. 59.

⁵ Miller v. Hoyle, 6 Ired. (Eq.) 269; Brown v. Blydenburgh, 7 N. Y. 141, 57 Am. Dec. 507; Bolen v. Crosby, 49 N. Y. 183.

⁶ Mabry v. Memphis, 12 Heisk. 537.

⁷ Ledwich v. McKim, 53 N. Y. 307; Gilfert v. West, 33 Wis. 617.

⁸ Emmerson v. Claywell, 14 B. Mon. 18, 58 Am. Dec. 645; Winstell v. Hehl; 6 Busch 62.

ranty on his part that the obligee will pay it, or that he will repay the consideration in case the obligee fails.³

§ 370. *Assignment by Statute.*

Modern statutes have greatly extended the common-law rules as to the assignability of choses in action, either by express words, or indirectly in the code States, by authorizing the assignee to bring the action in his own name or by requiring all actions to be brought in the name of the real party in interest, thus adopting the doctrines of equity on the subject.¹

“The effect of our new code of practice, in abolishing the distinction between law and equity, is to allow the assignee of a chose in action to bring suit in his own name in cases where by the common law no assignment would be recognized. In this respect the rules of equity are to prevail, and the assignee may sue in his own name.”²

The test of whether a cause of action is assignable is, would it survive to the executors or administrators of the assignor in case of his death? If it would, it is assignable. Therefore, all choses in action arising upon contract which were assignable in equity;³ all estates and interests in either chattels, lands or tenements;⁴ or claims arising out of them,⁵ are assignable under the statutes of the different States.

³ *Garretsie v. Van Ness*, 2 N. J. (L.) 20; 2 Am. Dec. 333; *Jackson v. Crawford*, 12 S. & R. 165; *Walker v. Scott*, 2 Nott & McC. 286; *Contra*, *Mackie v. Davis*, 2 Wash. 116, 1 Am. Dec. 482; *Austin v. Wallace* (Wash.), 200 P. 566.

¹ See the provisions of the statutes in 1 Stim. Am. St. L. 4031; *Winn v. R. Co.*, 33 S. W. Rep. 593 (Tex.).

² *Gamble, J.*, in *Walker v. Mauro*, 18 Mo. 564; *Allen v. Brown*, 44 N. Y. 228; *Motor Car Co. v. McPhalen*, 27 B. C. 244.

³ *Jordan v. Thornton*, 7 Ark. 224, 44 Am. Dec. 546; *Snyder v. R. R. Co.*, 86 Mo. 613; *Davis v. R. R. Co.*, 25 Fed. 786; *Strong v. Clem*, 12 Ind. 39, 74 Am. Dec. 200.

⁴ *Ensign v. Kellogg*, 4 Pick. 1; *Gardner v. Byard*, 23 Ga. 289, 68 Am. Dec. 527; *Van Rensselaer v. Hayes*, 19 N. Y. 68, 75 Am. Dec. 278.

⁵ See *Lawson Rights, Rem. & Pr.*, § 2650, et seq., where the cases are collected.

On the other hand, a claim for a personal injury which does not survive to the personal representatives of the party injured or wronged is not assignable; ⁶ as for example, actions for deceit, for breach of promise of marriage, for negligent injury to the person, for slander or for malicious prosecution.⁷

§ 371. *Assignability Distinguished from Negotiability.*

We have seen that the assignment of a contract binds the party chargeable to the assignee, only when notice is given to him, and subject always to the rule that the assignor cannot give a better title than he possesses himself. But there is a class of promises the benefit of which is assignable in such a way that the promise may be enforced by the assignee of the benefit without previous notice to the promisor, and without the risk of being met by defenses which would have been good against the assignor of the promise. This is called Negotiability.

The origin of this difference was the bill of exchange first invented by Lombard merchants and by their custom having this peculiarity. In England the courts recognized this custom, but refused to extend it to promissory notes which had to be made negotiable by statute.

The negotiable instruments known to our law are bills of exchange, checks and promissory notes, bills of lading, certificates of deposit, certain kinds of bonds and coupons,

⁶ *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Devlin v. Mayor*, 63 N. Y. 15; *Linton v. Hurley*, 104 Mass. 353; *Dayton v. Fargo*, 45 Mich. 153; *Stewart v. Houston, etc., R. Co.*, 62 Tex. 246; *Miller v. Newell*, 20 S. C. 127.

⁷ *Dayton v. Fargo*, 45 Mich. 153; *Ward v. Blackwood*, 41 Ark. 295; *Jenkins v. French*, 58 N. H. 522.

warehouse receipts and bank bills.¹ The peculiar incidents and privileges annexed to this class of promises are, that the assignee can sue all parties to the instrument in his own name; that the consideration for the transfer is *prima facie* presumed; that the assignor can under certain conditions give a good title, although he has none himself; and that the assignee can further negotiate the bill with the like privileges and incidents.² But any further discussion of negotiability belongs not here, but to the special treatises on Negotiable Instruments.

(b)

ASSIGNMENT BY OPERATION OF LAW.

§ 372. *Assignment by Marriage.*

At common law one of the immediate effects of marriage was that the husband became bound to pay all outstanding debts of his wife, of whatever amount, as a sort of recompense for taking her property.¹ But by statute in several of the States this liability is either abolished altogether, or the husband's property except such as he acquires from the wife is not liable for the wife's prenuptial debts.²

¹ Bills of exchange, checks, bank bills, certificates of deposit, and certain classes of bonds were negotiable at common law by the law merchant. Promissory notes are negotiable by statute in all the States. Bills of lading and warehouse receipts are negotiable in many of the States by statute.

² Lawson Rights, Rem. & Pr. § 1555.

¹ Lamb v. Belden, 16 Ark. 539; Butler v. Breck, 7 Met. 164, 39 Am. Dec. 768; Prescott v. Fisher, 22 Ill. 390; Harrison v. Trader, 27 Ark. 288.

² The statutes giving the wife her own property did not in some states take away the husband's liabilities for her ante-nuptial debts; "In this particular the modern husband is twice happy. First he is happy as the quiet spectator of his wife's enjoyment of her property, and again he is happy in paying her debts or if he refuses, in being sued and compelled to pay," Platner v. Patchen, 19 Wis. 337; Alexander v. Major, 31 Ohio St. 546. In Illinois it was held that though

§ 373. *Assignment by Death.*

Death passes to the executors or administrators of the deceased all his personal estate, all rights of action which would affect the personal estate, and all liabilities which are chargeable upon it.¹ A person making an agreement is presumed to intend to bind his executors and administrators,² unless it is of a personal kind or one involving skill which can only be performed by the party making it.³ Thus a contract for personal service comes to an end at the death of either master or servant,⁴ and so would an agreement by an author to write a book or of an attorney to render professional services or of a teacher or of a physician, or an agreement to marry.⁵

“The duty of the survivor to a contract of a strictly personal nature to perform his covenants terminates with the death of the other party to it, for the reason that neither of the contracting parties contemplated attempted performance by a substitute. Where distinctly personal services, requiring peculiar skill, are to be rendered by each of the contracting parties as inducements to the contract, there is mutuality, and the death of either of the parties is the death of the contract. In such a case the personal representa-

a statute gave the wife her property separate from her husband, yet if it does not give her her earnings, her husband was still liable for her ante-nuptial debts. *Conner v. Berry*, 46 Ill. 370; *McMurtry v. Webster*, 48 Ill. 123. But a subsequent statute having given her her earnings the court said: “The Legislature has thus swept away the last vestige of the reasons upon which the common-law rule rested. The rule itself must now cease. Legislative action has virtually abolished it by taking away its foundation and rendering its enforcement unjust.” *Howarth v. Warmser*, 58 Ill. 48.

¹ *Lawson Rights*, Rem. & Pr., § 2846.

² *Chamberlain v. Dunlap*, 126 N. Y. 45.

³ *Marvil v. Phillips*, 162 Mass. 399, 38 N. E. 1117; *Schultz v. Johnson*, 5 B. Mon. 497; *Siler v. Gray*, 86 N. C. 566; *Smith v. Preston*, 170 Ill. 179.

⁴ *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578; *Lacy v. Getman*, 119 N. Y. 101.

⁵ *Stebbins v. Palmer*, 1 Pick. 71, 11 Am. Dec. 146; *Siler v. Gray*, 86 N. C. 566.

tive of the deceased cannot call upon the survivor to perform, and the latter cannot require the obligations to him to be assumed and discharged by another.”⁶

A lumber manufacturer agreed to sell to a lumber merchant certain quantities of his product for to be sawed at his mill during five years. Before the end of the term both parties died, and it was held that the representatives of the vendee could not enforce the contract.

“Is it probable that either party intended to bind his executors or administrators? The contract does not say so, and we think it did not mean it, for it would involve the intention that the administrators of one shall be lumber merchants and those of the other sawyers. The law trusts people to settle up estates on account of their honesty and general business capacity and not for any peculiar scientific or artistic skill, and the State does not hold itself bound to furnish such abilities.”⁷

But an agreement which may be performed as well by one person as by another, may be performed by the personal representative of the deceased who may enforce its provisions against the surviving party; and on the other hand the personal representative is bound to carry out such an agreement and if he fails to do so, he may be compelled to pay damages out of the assets of the estate in his hands.⁸ Thus an agreement to buy or sell goods or to pay money would at the death of the promisor devolve on his personal representative.⁹

But, though he may complete a building contract, he is not obliged to do so. “In such a situation he might well consider the hazard of attempting to carry on compared with

⁶ *Blakely v. Sousa*, 52 Cent. L. J. 129 (Pa.).

⁷ *Dickinson v. Callahan*, 19 Pa. St. 227.

⁸ *Saboni v. Kirkman*, 1 M. & W. 418; *Janin v. Brown*, 59 Cal. 57; *Smith v. Wilmington Co.*, 83 Ill. 498.

⁹ *Wentworth v. Cook*, 10 Ad. & E. 42; *Cooper v. Jarman*, L. R. 3 Eq. 98; *Riblett v. Wallis*, 1 Daly, 360.

the slight damages the owner of the building would be entitled to recover for the breach of the contract.”¹⁰

And a breach of contract which involves a purely personal loss does not pass by death to the representatives of either party,¹¹ and hence even under statutes which provide that a personal representative may sue or be sued on any contract of or with his deceased, it is held that an action for breach of promise of marriage cannot be maintained either against or by the representatives of the promisor.¹²

§ 374. *Assignment by Bankruptcy.*

Bankruptcy operates to confer upon the assignees of the bankrupt, his rights and liabilities.

§ 375. *Interests in Lands.*

And where an interest in land is transferred rights and liabilities attaching to the enjoyment of the interest pass with it. Thus if A by purchase or lease acquire an interest in land of B, upon terms which bind them by contractual obligations in respect of their several interests, the assignment by either party of his interest to C will within certain limits operate as a transfer to C of those obligations. Such obligations are termed covenants and those which pass to the assignee are those which are said to “run with the land.”¹¹

For a covenant to run with the land, its performance or non-performance must affect the nature, quality, or value of the property demised, independent of collateral circum-

¹⁰ Exchange Nat. Bk. v. Betts, 103 Kan. 807, 176 Pac. 660. In Quick v. Ludborrow, 3 Bulst. 30, Lord Coke said that if a man agrees to build a house for another and dies, his executors are bound to perform. But this is contrary to the principle stated above.

¹¹ Chamberlain v. Williamson, 2 M. & S. 408.

¹² Grubb v. Sult, 32 Gratt, 207; Wade v. Kalbfleisch, 58 N. Y. 282; Chase v. Fitz, 132 Mass. 313; Allen v. Baker, 86 N. C. 91.

¹ Gordon v. George, 12 Ind. 408; Fisher v. Dearing, 60 Ill. 114; Shaber v. St. Paul Water Co., 30 Minn. 179.

stances, or it must affect the mode of enjoyment, and there must be a privity between the contracting parties.² But this class of promises is a branch of the law of Real Property and will not be further discussed here.

§ 375a. *Interests in Business.*

A valid covenant by the seller of a business not to engage in a similar business, not only is assignable with a subsequent sale of the business, but passes to a subsequent purchaser of it even if not expressly assigned, as an incident to the sale.¹

² *Wiggins Ferry Co. v. R. R. Co.*, 94 Ill. 83.

¹ *Sickles v. Bowman*, 160 N. W. 670 (Ia.) and note 4 A. L. R. 1078.

PART III.

THE INTERPRETATION OF THE CONTRACT

§ 376. INTRODUCTORY.

§ 376. *Introductory.*

We have considered the elements necessary to the Formation of the Contract, and its Operation as regards those who were parties to its formation and those who became interested in it by assignment. We now pass to the Interpretation of the Contract, *i. e.*, the meaning which is attached to it, and the liabilities thereunder, when it is presented to a court for enforcement. This subject is naturally divisible into two parts, and will be considered in the two succeeding chapters, *viz.*: 1st. The sources to which we may go for the purpose of ascertaining the expression by the parties of their common intention—which we call *proof of the contract*, and 2d. the rules which exist for construing that intention from expressions ascertained to have been used,—which we call *construction of the contract*.

CHAPTER X.

THE PROOF OF THE CONTRACT.

SECTION 377. Proof of oral contracts.

378. Proof of contracts in writing.

379. Oral evidence to vary or contradict writing inadmissible.

I.

PROOF OF EXISTENCE OF DOCUMENT.

380. Contracts under seal.

381. Written contracts not under seal.

II.

PROOF OF FACT OF AGREEMENT.

382. Proof that there is no valid contract.

383. Proof that the apparent contract is not in force.

III.

PROOF OF TERMS OF AGREEMENT.

384. How far oral evidence admissible.

(A) SUPPLEMENTARY AGREEMENTS.

385. Evidence of supplementary or collateral agreement.

(B) EXPLANATION OF TERMS.

386. Identity of parties.

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388. Application of phrases.

389. Latent and patent ambiguity.

(C) USAGES OF TRADE.

390. To explain technical terms in written contracts.

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§ 377. *Proof of Oral Contracts.*

Where the agreement is made by word of mouth, and it is of such a character that it is not required to be proved

by written evidence,—as contracts under the Statute of Frauds for example are—the only thing to prove is what the parties said, and it is not open to either of them to say that he did not mean what he said.¹ When the exact language of the parties is disputed it is for the jury to determine as matter of fact what they did say, and the court (the jury having found what they did say) decides whether what they have said amounts to an agreement, and if so, what is its effect.

§ 378. *Proof of Contract in Writing.*

An agreement under seal, as we have seen,¹ derives its validity from its form, and therefore when the execution of such an instrument is proved the agreement is proved. But a written agreement not under seal is only evidence of the agreement between the parties, and where the agreement is not required by statute to be in writing, it is optional to the parties to express their agreement by word of mouth, by act or by writing, or partly in one way and partly in the other. Therefore it will often happen that the contract will have to be sought for in the words and acts as well as the writing of the contracting parties. But it must always be borne in mind that so far as they have reduced their agreement to writing they are not allowed to prove any oral language they may have used contradicting or altering the writing.

§ 379. *Oral Evidence to Vary or Contradict Writing Inadmissible.*

When parties reduce their agreement to writing the law presumes that they intend to embody therein those only of

¹ Ante § 205.

¹ Ante; Deeds.

the oral negotiations and statements that have been made on one side or the other, which they have finally agreed upon, and hence it excludes and refuses to hear evidence of representations made or terms offered during its negotiations; and will not admit oral evidence to vary, alter or add to the written agreement.¹ Nevertheless oral evidence is necessarily admitted in some cases when the agreement is or purports to be in writing. And these cases are three, viz.: I. To prove the existence of the document. II. To prove the fact of the agreement. III. To prove the terms of the agreement.

I.

PROOF OF EXISTENCE OF DOCUMENT.

§ 380. *Contracts Under Seal.*

A contract under seal is proved by evidence of the sealing and delivery. At common law when the deed was witnessed it was necessary to call one of the attesting witnesses to prove it.¹ If the attesting witness was dead, or incapable of testifying, or out of the jurisdiction of the court, execution of the deed might be shown by proving the handwriting of such witness.² But it is now generally held that when the attesting witnesses can not be produced, proof of the handwriting of the party is sufficient, unless the instrument was required by law to be attested by witnesses.³

¹ See article 25 Cent. L. J. 35.

² Story v. Lovett, 1 E. D. Smith, 153; Brigham v. Palmer, 3 Allen, 450; Hall v. Phelps, 2 Johns. 451.

³ Story v. Lovett, 1 E. D. Smith, 153; Dunbar v. Marden, 13 N. H. 311; Beattie v. Hillard, 55 N. H. 436; Richards v. Skiff, 8 Ohio St. 586; Valentine v. Piper, 22 Pick. 85; Davis v. Higgins, 91 N. C. 382; Elliott v. Dyke, 78 Ala. 150.

⁴ Sanborn v. Cole, 63 Vt. 590; Landers v. Bolton, 26 Cal. 394; Newsum v. Luster, 13 Ill. 182; Cox v. Davis, 17 Ala. 717; Woodman v. Segar, 25 Me. 90.

§ 381. *Written Contracts Not Under Seal.*

Where the contract is in writing not under seal—a simple contract—parol evidence is admissible to prove the signatures of the parties,¹ or to prove the time when it was made, where no date appears,² or to show who the parties are,³ or the consideration,⁴ or to supplement the writing when the writing constitutes only a part of the contract⁵ as, for example, if A writes to B: “I will give you \$250 for your horse; if you accept, send him to me by train;” to the conclusion of the contract it would be necessary to prove the despatch of the horse. And so if A puts the terms of an agreement into a written offer which B accepts by word of mouth; or if, where no writing is necessary, he puts a part of the terms into writing and arranges the rest orally with B, parol evidence must be given in both these cases to show that the contract was concluded upon those terms by the

¹ The early common law which required the evidence of the subscribing witness to prove any kind of a writing was relayed later as to instruments not under seal. See *Fox v. Reil*, 3 Johns. 473, for a history of this. The handwriting of a person if he refuses to admit that the writing produced is his, may be proved in any one of the following ways. I. By the evidence of any person who saw him write it. II. By the opinion of any person acquainted with his handwriting, that it is his. And a person is said to be “acquainted” with another’s handwriting within this rule, 1st, when he has seen that person write; 2nd, when he has received letters from him in answer to letters written to him by the witness or under his direction or authority; 3rd, when in the ordinary course of business, writing purporting to be written by him has passed through his, the witness’ hands; 4th, when holding at the time an official position, signatures or writings of the person have come before him; 5th, when he has seen a signature which the person has acknowledged to be his. III. By a comparison of the disputed writing with other writings of the party proved or admitted to be genuine. IV. By the opinions of experts in handwriting. See *Lawson Expert & Opinion Ev.* 277, 428.

² *Lawson Rights, Rem. & Pr.*, § 2311.

³ *Id.* *Barkley v. Tarrant*, 20 S. C. 574, 47 Am. Rep. 853.

⁴ *Wood v. Moriarty*, 15 R. I. 518.

⁵ *Lark v. Parlin*, 78 Mo. 392.

acceptance of B.⁶ So where a contract consists of several documents which need oral evidence to show their connection, such evidence may be given to connect them.⁷ Where a writing is lost or destroyed parol evidence of its contents is allowed to be given.

II.

PROOF OF FACT OF AGREEMENT.

§ 382. *Proof That There Is No Valid Contract.*

It is always open to a party to prove that a writing which on its face appears to be a valid contract is as a matter of fact not so, but lacks one of its necessary elements. Thus it may be shown that the writing that the plaintiff is endeavoring to enforce was never to be performed, but was a mere sham executed for the purpose of influencing a third person.¹ Such evidence is admitted not to alter the purport of the agreement, but to show that it was made under such conditions as to preclude the reality of consent, or for such a purpose as the court would not lend its aid to enforce. It may be shown by oral evidence that the instrument is of no binding effect because entered into under a mistake or was obtained by forgery or fraud, or through duress, or was made on an illegal consideration or in furtherance of an illegal object,² or by persons incapable of

⁶ Anson Contr. 241; Broughton v. Null, 56 Mo. (App.) 231.

⁷ Bergin v. Williams, 138 Mass. 544; Myers v. Munson, 65 Ia. 423; Blake v. Coleman, 22 Wis. 376; Beer v. Aultman-Taylor Co., 32 Minn. 90; Colby v. Dearborn, 59 N. H. 326. Aliter as we have seen under the statute of frauds, Ante.

¹ Coffman v. Malone, 98 Neb. 819, 154 N. W. 726. And see note in L. R. A. 1917 B. 263.

² See Wooden v. Shotwell, 23 N. J. (L.) 465; Buffendeau v. Brooks, 28 Cal. 641; Allen v. Hawks, 13 Pick. 79; Totten v. United States, 92 U. S. 105; Sackford v. Newington, 46 N. H. 415; Pratt v. Langdon, 97 Mass. 97; Perkins v. Robertson (N. J.), 114 A. 856.

contracting, or was made without consideration,³ or for a different consideration than stated.⁴

§ 383. *Proof That Apparent Contract Is Not in Force.*

It is also admissible to show by oral evidence that the apparent contract is not as a matter of fact in force at all. Thus a deed may be shown to have been delivered subject to the happening of an event or the doing of an act.¹ So, a simple contract may be shown to have been signed upon a condition which has not been performed.²

In *Pym v. Campbell*,³ defendants agreed to purchase from plaintiffs a portion of the benefits to be derived from a mechanical invention made by plaintiffs. The purchase was to be made if one A approved of the invention, but before this approval had been given they signed a memorandum of agreement on the express understanding that they did so for convenience only and that the agreement was not to bind them until the approval of A had been intimated. A did not approve of the invention. Plaintiffs contended that the agreement was binding and that the verbal condition was an attempt to vary by parol the terms of a written contract. But the court held that the evidence was admissible.

“The distinction, in point of law, is this, that evidence to

³ Lawson Rights, Rem. & Pr., § 2312.

⁴ Moore v. Ringo, 82 Mo. 468. The purpose of a deed may be shown by parol. Baptist City Mission v. People's Tabernacle, 174 Pac. 1118 (Colo.). As to parol evidence to vary or explain the contract implied from the indorsement of a bill or note, see note to Hawkins v. Shields, 100 Miss. 739, 57 South. 4, in 4 A. L. R. 764.

¹ See Ante, Deeds. Hagen v. Hagen, 161 N. W. 380 (Minn.).

² Pierce v. Woodward, 6 Pick. 206; Shugart v. Moore, 78 Pa. St. 469; Cuthrell v. Cuthrell, 101 Ind. 375; Reynolds v. Robinson, 110 N. Y. 654; Westman v. Krumweide, 30 Minn. 313; Blewett v. Borum, 142 N. Y. 357; Colvin v. Goff, 161 Pac. 568 (Or.) and see note L. R. A. 1917 C. 306.

³ 6 E. & B. 370; Ware v. Allen, 9 S. C. Rep. 80.

vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.”

III.

PROOF OF TERMS OF AGREEMENT.

§ 384. *How Far Oral Evidence Admissible.*

The rule being so well established and so extensive in its operation that a written contract cannot be varied or added to by verbal evidence of the intention of the parties, the cases in which such evidence will be admitted to affect the terms of a contract as they appear in writing are necessarily few and are restricted to evidence (a) of supplementary or collateral agreements (b) of explanation of terms and (c) of usages of trade.

(a)

SUPPLEMENTARY AGREEMENTS.

§ 385. *Evidence of Supplementary or Collateral Agreements.*

Where parties to a contract have not put all its terms into writing, evidence of its supplementary terms is admissible, not to vary, but to complete the written contract.¹

In *Malpas v. London, etc., R. Co.*,² a cattle dealer wanting to send some cattle from Guildford to Islington, they

¹Cook v. Murphy, 70 Ill. 96; Lyon v. Lemon, 106 Ind. 567; Wood v. Gertner, 55 Mich. 453; Mobile, etc., Co. v. Jurey, 111 U. S. 584; Reynolds v. Hassam, 56 Vt. 449; Lash v. Parlin, 78 Mo. 391; Brown v. Bowen, 90 Mo. 184; Welz v. Rhodius, 87 Ind. 1, 44 Am. Rep. 747; Wood v. Moriarty, 15 R. I. 518; Locke v. Murdock, 20 N. M. 522, 151 Pac. 298, and note L. R. A. 1917 B. 276.

²L. R. 1 C. P. 336.

told him at Guildford station that the beasts would be duly forwarded to King's Cross; but they inveigled him into signing a note by which the cattle were directed to be taken to the Nine Elms station, which was not so far as the cattle dealer expected them to go. At this intermediate station they remained and suffered injury. The company argued that the note was conclusive evidence of the terms of the contract and therefore that they had never undertaken to carry further than the Nine Elms station. But for the cattle dealer it was successfully contended that the note did not constitute a complete contract and that parol evidence could be given of the conversation that had taken place between plaintiff and the company's servants before the note was signed. As to the company's argument that the written contract was conclusive evidence that the cattle were to be carried to Nine Elms and no farther, Erle, C. J. said:

"I think that it is not so, because it seems clear on the evidence that there may have been a contract to carry to Nine Elms and an additional contract to carry the cattle on from thence to King's Cross. The parol evidence therefore does not vary or contradict the written document, but only makes an addition to it."

There are other cases, however, in which parol evidence may be given, notwithstanding that there is a written contract.

"The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them may be proved."³

Thus in an action on a lease, an oral promise by the lessor to keep down the game may be shown.⁴ So upon the execution of

³ Steph. Dig. Ev. (8th ed.) 99; Williams v. Jones, 36 W. R. 573.

⁴ Morgan v. Griffith, L. R. 6 Ex. 70, 40 L. J. Ex. 46.

a lease of a dwelling-house, the landlord verbally warranted that the drains were in good condition. The lease contained covenants by the lessee to do the inside, and by the lessor to do the outside repairs, but was silent as to the then condition of the drains. The parol warranty was declared independent of the lease and admissible.⁵

(b)

EXPLANATION OF TERMS.

§ 386. *Identity of Parties.*

Oral evidence is admissible to explain the identity of the parties to the contract, as where two persons have the same name, or where an agent has contracted in his own name, but on behalf of a principal whose name or whose existence he does not disclose.¹

§ 387. *Identity of Subject-matter.*

Oral evidence is admissible to identify the subject-matter of the contract.¹ Thus, where the subject of property is described in the contract or conveyance by the locality, as being in a particular town or place; or by its character, quality, or use, as in a contract to sell "the mill property;" or by the ownership, as in a contract to sell "my house," or "Mr. O's house;" or by the occupation of a certain person,—in all such cases evidence is admissible to show what

⁵ De La Salle v. Guildford, 2 K. B. 215, 70 L. J. K. B. 533.

¹ Johnson v. Bennett, 67 Ia. 679; Sauer v. Brinker, 77 Mo. 289; Kelly v. Thuey, 102 Mo. 528; Anderson v. Dyer, 81 Me. 104. See Heffron v. Pollard, 28 Cent. L. J. 422.

¹ Evidence is always admissible to explain the calls of a deed. Kleine v. Kleine, 219 S. W. 610 (Mo.).

is the property answering to the description of place, character, ownership, or occupation or what is reputed so to be.

Oral evidence is admissible to ascertain the subject-matter of the agreement, including the situation of the parties and the surrounding circumstances, so that the court may stand in the same light in reading the words of the contract as the parties did when they used them.³

§ 388. *Application of Phrases.*

Oral evidence is also admissible in explanation of words in the contract not describing the subject-matter of the contract, but the amount and character of the responsibility which one of the parties takes upon himself as to the conditions of the contract.¹ Where a vessel is warranted "seaworthy," a house promised to be kept in "tenantable" repair, a thing undertaken to be done in a "reasonable" manner, goods "about" a certain quantity agreed to be furnished,² evidence is admissible to show the application of these phrases to the subject-matter of the contract, and so to ascertain the intention of the parties.³

§ 389. *Latent and Patent Ambiguity.*

Oral evidence is admissible to explain a latent ambiguity in the instrument. A latent ambiguity is not apparent on the face of the instrument which seems plain enough until you show that certain words apply to two different things.

² Leake Contr. 211; Thornell v. Brockton, 141 Mass. 151; Home v. Chatham, 64 Tex. 36; Lyman v. Gedney, 114 Ill. 388; Chambers v. Watson, 60 Ia. 339, 46 Am. Rep. 70.

³ Excelsior Wrapper Co. v. Messinger, 116 Wis. 594, 93 N. W. 459; Merriam v. U. S., 107 U. S. 437.

¹ Ganson v. Madigan, 15 Wis. 144.

² Waddell v. Phillips, 133 Md. 497, 105 Atl. 771; Wolff v. Wells, 115 Fed. 32, 52 C. C. A. 626.

³ Anson Contr. 246.

r subject-matters, and then evidence is admissible to prove which of them was the thing or subject-matter intended.¹

In *Sargent v. Adams*,² defendant entered into a written agreement to lease to plaintiff the "Adams House" in Boston for a term of ten years. Defendant had fitted up an old hostelry called the Lamb Tavern as a hotel and had christened it the "Adams House." The entrance to the hotel was on Washington street, and was numbered 371. The rest of the ground floor of the building was fitted up for stores which were numbered 1, 2, 3, 4 and 5, Adams House. When the time came for defendant to present plaintiff with the lease the latter discovered that it did not include all these stores, but only one of them. He therefore refused to accept it and brought an action to recover back sum of money which he had advanced to defendant under the agreement. But the Supreme Court allowed defendant to prove by parol that the agreement originally was that the lease should include only the hotel proper and one of the stores, saying:

"The court are of opinion, that this constituted a case of latent ambiguity as that is understood and explained in this department of the law. It falls under that class of cases where the very general description adopted in a contract will apply to two distinct subjects and so there is a latent ambiguity."

In an English case where a devise was to S H, *second* son of J II, whereas really S II was the *third* son, evidence of the surrounding circumstances was admitted to show whether the testator had made a mistake in the name or in

¹ Waymack v. Heilman, 26 Ark. 449; Wood v. Augustine, 61 Mo. 6; Fenderson v. Owen, 54 Me. 374, 92 Am. Dec. 551; American Express Co. v. Schier, 55 Ill. 140; Lowry v. Adams, 22 Vt. 160; Conover v. Wardell, 20 N. J. (Eq.) 266; Terrell v. Walker, 69 N. C. 244; Poindexter v. McCannon, 1 Dev. Eq. 373, 18 Am. Dec. 591; Verzan v. McGregor, 23 Cal. 339; Beasley v. Beasley (Ala.), 90 S. 347.

² 3 Gray, 72, 63 Am. Dec. 718.

the description.³ In another recent case (*r*) where under a written contract a person was to be allowed a commission on "the estimate of 35,000*l.*," and a further commission if "the total cost of the works" was reduced below 30,000*l.*; extrinsic evidence was held admissible to show that the estimate referred to was for the execution of the work exclusive of the cost of the land purchased and the amount of the commission.⁴

But a *patent* ambiguity, *i. e.*, an ambiguity appearing on the face of the instrument itself, cannot be explained by parol.⁵ Thus, where a bill of exchange was drawn for "two hundred pounds" but the figures at the top were "245," evidence was not admitted to show that the bill was intended to be drawn for the larger amount.⁶

In *Bradley v. Rees*,⁷ a testator devised land to "the four boys," and parol evidence was held admissible to show that he had seven sons, three of whom were adults living in their own homes, and four minors living with him, and that the latter were the "four boys" meant.

"It is said that this is a patent ambiguity, and it is only *latent* ambiguities which can be explained by parol proof. We do not think so. Take the will upon its face the inference would naturally be that the testator had but four sons, and there is therefore on the face of the will, no ambiguity. It is only from proof *aliunde* that there were seven sons that any ambiguity is made apparent."

In an English case a man had devised one house to George Gord, the son of George Gord, a second to George Gord, the son of John Gord, and a third to "*George, the son of Gord.*" Evidence was admitted to show that the testator really meant George, the son of *George* Gord. It was objected that the

³ *Doe v. Huthwaite*, 3 B. & Ald. 632, 8 Taunt. 306.

⁴ *Bank of New Zealand v. Simpson*, A. C. 182, 69 L. J. P. C. 22.

⁵ *Aspden's Estate*, 2 Wall. Jr. 368.

⁶ *Sanderson v. Piper*, 5 Bing. N. C. 425.

⁷ 113 Ill. 327, 55 Am. Rep. 420.

ambiguity was *patent*, but it was answered that it could only appear ambiguous by showing *aliunde* the non-existence of a George, the son of Gord, different from the other two Georges; and that the mention of another George in the same will had no other effect than extrinsic proof of the same fact would have had.⁸

(c)

USAGES OF TRADE.

§ 390. *To Explain Technical Terms in Written Contracts.*

The customs of particular classes of men soon give to particular words different meanings from those which they may have among other classes, or in the community generally. Mercantile contracts are commonly framed in a language peculiar to merchants, and hardly understood outside their world. Agreements which are entered into every day in the year between members of different trades and professions are expressed in technical and uncommon terms. The intentions of the parties, though perfectly well known to themselves, would be defeated were the language employed to be strictly construed according to its ordinary meaning in the world at large. Hence, while words in a contract relating to the ordinary transactions of life are to be construed according to their plain, ordinary and popular meaning, yet if, in reference to the subject-matter of the contract, particular words and expressions have by usage acquired a meaning, different from their plain, ordinary and popular meaning, the parties using those words in such a contract must be taken to have used them in their peculiar sense. And so words technical or ambiguous on their face, or foreign or peculiar to the sciences or the arts, or to particu-

⁸ Doe v. Needs, 2 M. & W. 129.

lar trades, professions, occupations or localities, may be explained, where they are employed in written instruments, by parol evidence of usage.¹

The evidence is not incompetent because the words are in their ordinary meaning unambiguous, for the principle of admission is that words perfectly unambiguous in their ordinary meaning are used by the parties in a different sense.² What words are more plain and unambiguous on their face than such words as "a thousand," "a week," "a day"? Yet, "a thousand" by the custom of the particular business or trade has been shown to mean twelve hundred and seven hundred respectively; "a week," a week only during a portion of the year; "a day," only ten hours.³

§ 391. *To Add Unexpected Terms to Written Contracts.*

And it has been long recognized by the courts that it is quite as necessary to allow usage to explain what was purposely left unsaid as what was clothed in technical language, the principle on which such usages are admitted resting on the "presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages,"¹

¹ *Brenneman v. Brush*, 30 S. W. 699 (Tex.). See *Lawson Usages & Customs*, and my article in 12 Cyc. 1028 as to the requisites of a valid usage. *McCarthy v. Pigment* (N. Y.), 194 N. Y. S. 138.

² *Lawson, Usages & Customs*, § 181.

³ *Smith v. Wilson*, 3 B. & A. 728; *Soutier v. Kellerman*, 18 Mo. 509; *Grant v. Maddox*, 15 M. & W. 737; *Horton v. Locke*, 5 Hill 437.

¹ Ante, Chap. II.

Exam question

CHAPTER XI.

THE CONSTRUCTION OF THE CONTRACT.

SECTION 392. Introductory.

- 393. First Rule of Construction—Intent of Parties.
- 394. Second Rule—Words Taken in Their Ordinary Meaning.
- 395. Third Rule—Whole Instrument Looked to.
- 396. Subsidiary Rules.
- 397. Several Instruments Construed as One.
- 398. Inconsistent and Repugnant Words.
- 399. Expressio unius—General and Specific Directions.
- 400. Construction by the Parties.
- 401. Legal and Reasonable.
- 402. Written and Printed Words.
- 403. Grammar and Punctuation.
- 404. Construction Against Party Using Words.

§ 392. *Introductory.*

The object of rules of construction is to ascertain the intention of the parties.¹

“The great object of construction is to collect from the terms or language of the instrument, the manner and extent to which the parties intended to be bound. To facilitate this, the law has devised certain rules, which are not merely conventional, but are the canons by which all writings are to be construed, and the meaning and intention of men to be ascertained. These rules are to be applied with consistency and uniformity. They constitute a part of the common law and the application of them, in the interpretation and construction of dispositive writings, is not discretionary with courts of justice, but an imperative duty. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it.”²

¹ 9 Cyc. 577; 13 C. J. 482. The construction of a written contract is for the court and not for the jury; *Graham v. Sadlier*, 46 N. E. Rep. 221 (Ill.); *Adney v. Kraus* (Wis.), 183 N. W. 988.

² *County of Johnson v. Wood*, 84 Mo. 489.

§ 393. *First Rule of Construction—Intent of Parties*

When there is no doubt as to the intention of the parties these technical rules of construction ought not to be resorted to.¹ The first main rule and the foundation rule of construction is therefore that when the meaning of language is to be determined by the court the intent of the parties, expressed in the words they have used, must govern.²

§ 394. *Second Rule—Words Taken in Their Ordinary Meaning.*

The second main rule is that words are to be taken in their ordinary and popular meaning.¹ The law presumes that a person meant what his language, by its terms and under the circumstances in which it was used, would be fairly understood to mean, and this presumption cannot be rebutted by proof that he intended something more or different which he did not express, and which the person dealing with him neither understood nor had reason to understand.² This is, of course, subject to evidence that by the usage of trade or otherwise the words have acquired a peculiar meaning;³ and technical words are to be interpreted as usually understood by persons in the profession or business to which they relate;⁴ (unless, it must be observed, they are clearly

¹ Noyes v. Nichols, 28 Vt. 659; Walker v. Douglass, 70 Ill. 527; Dwight v. Ins. Co., 103 N. Y. 347, 8 N. E. 654, 57 Am. Rep. 412; Williamson v. McClure, 37 Pa. St. 409.

² Melick v. Pidcock, 44 N. J. (Eq.) 525, 15 Atl. Rep. 3; Edwards v. Bowden, 99 N. C. 80, 5 S. E. 283; Radcliff v. Sharlan, 66 Wis. 138, 28 N. W. 136; Chesapeake, etc., Canal Co. v. Hill, 15 Wall. 94; Ford v. Beech, 11 Q. B. 852; U. S. v. Taylor Co., 268 Fed. 635.

³ 9 Cyc. 578; 13 C. J. 531.

⁴ Clark v. Little, 39 Vt. 405; Sachleben v. Wolfe, 61 Mo. (App.) 34; Ante, chap I; Nicholl v. Coal Co. (U. S.), 269 Fed. 968.

⁵ Ante, § 390.

⁶ Dana v. Fielder, 12 N. Y. 40; Gauch v. Ins. Co., 88 Ill. 251; Ellmaker v. Ellmaker, 4 Watts, 89. See ante, § 390.

used in a different sense;⁵ for it is obvious that if the expressions and phrases used by unprofessional men in their various negotiations were always to be taken in their technical sense, the interpretation would often violate their true intent and meaning.)⁶

§ 395. *Third Rule—Whole Instrument Looked to.*

The third main rule is that that construction will be given which will best effectuate the intention of the parties to be collected *from the whole of the agreement*;¹ and to ascertain the intention, regard must be had to the nature of the instrument, the condition of the parties executing it and the objects which they had in view.²

Courts will examine the whole of the contract, and so construe each part with the others that all of them may, if possible, have some effect,³ for it is to be presumed that each part was inserted for a purpose and has its office to perform.⁴ So where two clauses are inconsistent they should be construed so as to give effect to the intention of the parties as gathered from the whole instrument.⁵ So every word

⁵ Jackson v. Myers, 3 Johns. 388; Bowman v. Long, 89 Ill. 19, 21.

⁶ Wynkoop v. Cowing, 21 Ill. 581.

¹ Inconsistencies in a deed are to be reconciled, if possible. The old rule that the earlier clause controls the later one is only applicable when reconciliation is impossible. Waterman v. Andrews, 14 R. I. 589. So the construction of a deed which requires the rejection of a whole clause thereof will not be adopted, except from unavoidable necessity. City of Allen v. Trans. Co., 12 Ill. 38, 52 Am. Dec. 479. The clauses may be transposed so as to give it its apparent construction. Staton v. Mullis, 92 N. C. 623.

² Mobile, etc., R. Co. v. Jurey, 111 U. S. 584; Benjamin v. McConnell, 9 Ill. 536, 46 Am. Dec. 474; Conwell v. Pumphrey, 9 Ind. 135, 68 Am. Dec. 611; Field v. Woodmanly, 10 Cush. 427; Penfold v. Ins. Co., 85 N. Y. 317; Reed v. Ins. Co., 95 U. S. 23; Wilson v. Roots, 119 Ill. 379; Grabb v. Grabb, 101 Pa. St. 11.

³ 9 Cyc. 579.

⁴ Alton v. Transportation Co., 12 Ill. 56.

⁵ Bent v. Alexander, 15 Mo. App. 181.

will, if possible, be made to operate, if by law it may, according to the intention of the parties.⁶

This rule may seem to conflict with the second main rule, but the meaning is this, that men will be taken to have meant precisely what they have said, unless, from the whole tenor of the instrument, a definite meaning can be collected which gives a broader or narrower interpretation to specific words than their literal meaning would bear.⁷

Thus where a policy of insurance on a stock of goods in a store provided that it should be null and void "if the said property should be sold or conveyed," it was held that, although the words were broad enough to cover any kind of a sale, the intention of the parties was clearly not that they should have so wide a meaning; for such a construction "would bring the first mercantile sale at the counter within the condition;" but the kind of sale the parties intended was a sale of the entire interest in the stock.⁸ And however broad may be the words used, they will not be extended to those things concerning which it appears that the parties did not intend to contract.⁹ Thus where a contract of agency stipulates that the agent shall devote his "entire time" to the business of the principal, this will not be construed to mean that he shall work every hour of every day or even every day; but that he shall have the customary time for rest, recreation and amusement—that he shall work as others in the same business as accustomed to do.¹⁰

⁶ Richardson v. Palmer, 38 N. H. 212; Howell v. Howell, 7 Ired. 491, 47 Am. Dec. 335; Haywood v. Perin, 10 Pick. 228; Florida East Coast R. Co. v. Miami, 79 South. 682 (Fla.).

⁷ Anson Contr. 252; Canal Co. v. Hill, 15 Wall. 94; Walker v. Douglass, 70 Ill. 445; Chorm v. Schipper, 51 N. J. (L.) 1, 16 Atl. 316; Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256; Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62; Ehrlich v. Ins. Co., 88 Mo. 249.

⁸ Hoffman v. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337.

⁹ Hoffman v. Ins. Co., 32 N. Y. 405; Gage v. Tirrell, 9 Allen, 299; Robinson v. Stow, 39 Ill. 568.

¹⁰ Ehrlich v. Ins. Co., 88 Mo. 256.

§ 396. *Subsidiary Rules.*

Subsidiary to these three main rules there are a number of others all tending to the same end, the effecting of the intention of the parties to the contract so far as it can be discerned.

§ 397. *Several Instruments Construed as One.*

Courts will, where two or more instruments are executed at the time, relate to the same subject-matter, and one refers to the other, either tacitly or expressly, take them together and construe them as one instrument.¹ So where two instruments are executed as parts of the same transaction and agreement, whether at the same or different times, they will be taken and construed together.²

§ 398. *Inconsistent and Repugnant Words.*

Courts will reject words which are wholly inconsistent with the nature of the contract or the manifest intention of the parties.¹ And, if no meaning can be given to a word from the connection in which it is used, consistently with the intent on an examination of the whole instrument, it will be treated as surplusage.²

§ 399. *Expressio Unius—General and Specific Description.*

In accordance with the maxim *Expressio unius exclusio alterius*—the statement of one thing is the exclusion of others

¹ 9 Cyc. 580; 13 C. J. 528.

² Id.

¹ Salmon Falls Manfg. Co. v. Portsmouth Co., 46 N. H. 249; Hibbard v. McKinley, 28 Ill. 240; State Bk. v. Stewart, 93 Va. 447, 25 S. E. 543; Sharp v. Thompson, 100 Ill. 447, 39 Am. Rep. 66; Todd v. Superior Court, 184 Pac. 684 (Cal.). A deed may have the word "quitclaim" and yet be construed as a conveyance of the property. Cook v. Smith, 107 Tex. 119, 174 S. W. 1094.

² Tucker v. Weeks, 2 Sweeny, 736; Wells v. Tregusan, 2 Salk. 463.

—the express mention in an agreement of one thing or of one person or place or of a particular class or number implies the exclusion from the intention of the parties of all others not mentioned.¹

So general words following particular or specific terms are restricted in meaning to those things or matters which are of the same kind with those first mentioned.² Thus where, in a contract for shipment of horses, the shipper agreed to take the risk of injury to the horses “in loading, unloading, conveyance,” and “otherwise” and the company put the horses in a car with a defective floor and they were injured, it was held liable, the court saying that the word “otherwise” meant injuries caused during the loading, unloading, and transportation of the animals, and did not extend to its failure to furnish safe cars. The word was wide enough to include any kind of a loss, even from the carrier’s not sending them at all or refusing to deliver them, but it was restricted to the kind of things mentioned before it.³

So, general expressions will be restricted by particular descriptions or additions appended to them.⁴

§ 400. *Construction by the Parties.*

Courts will consider, where the intent is doubtful, the acts of the parties, the surrounding circumstances and the manner in which the contract has been executed by both or one of

¹ *Hearne v. Ins. Co.*, 20 Wall. 493; *Higgins v. Eagleton*, 34 N. Y. 225; *Bystra v. Bank (Fla.)*, 90 S. 478.

² *Railton v. Taylor*, 20 R. I. 279, 38 Atl. Rep. 982; *Terrance v. McDougald*, 12 Ga. 526; *Vaughan v. Porter*, 16 Vt. 266; *Saner v. Bilton*, 7 Ch. Div. 815.

³ *Hawkins v. R. Co.*, 17 Mich. 57, 97 Am. Dec. 179.

⁴ *Leake Contr.* 278; *Johnson County v. Wood*, 84 Mo. 489; *Railton v. Taylor*, 20 R. I. 279, 38 Atl. 980.

the parties with the express or implied assent of the other.¹ "Tell me," said an English chancellor, "what you have done under a deed, and I will tell you what that deed means."² Yet, where the meaning is clear an erroneous construction of it by the parties will not control its effect.³

A statement by one of the parties to the other there being a disagreement concerning its terms, "We will accept your interpretation" makes such interpretation binding on both.⁴

§ 401. *Legal and Reasonable.*

Courts will, where the meaning of the language used is doubtful, or susceptible of two senses, adopt that meaning which would give effect to the instrument as a valid and legal contract, rather than that which would render it inoperative.¹ Thus where a note was given payable January 1, 1836, "with interest from 1835" it was held that interest was recoverable from January 1, 1835, because otherwise the clause as to interest would be of no effect.²

In a Missouri case a ferry company and a railroad had entered into an agreement in which the latter stipulated that it would use the ferry for carrying its trains, passengers and freight across the Mississippi river at St. Louis, and that "no other than the said ferry shall ever be employed" by the railroad. Subsequently a bridge was built across the river and the railroad used that. The court held that if the provi-

¹ 9 Cyc. 588; 13 C. J.; Davison Chemical Co. v. Baugh Chemical Co., 104 Atl. 404 (Md.); Fullerton v. U. S. Casualty Co., 167 N. W. 700 (Ia.).

² Att. Gen. v. Drummond, 1 Dru. & W. 353. A promise to pay "interest" on an account stated means simple interest, as a promise to pay compound interest would be invalid. Newburger Co. v. Talcott, 219 N. Y. 505, 114 N. E. 846.

³ Railroad Co. v. Trimble, 10 Wall. 367; Davis v. Shafer, 50 Fed. Rep. 764.

⁴ Mark v. Stuart Howland Co., 226 Mass. 35, 115 N. E. 42.

¹ 9 Cyc. 586; 13 C. J.

² Evans v. Sanders, 8 Port. 497, 33 Am. Dec. 297.

sion meant that no other ferry company should be employed the agreement was valid but if it meant that no other improved means of carrying should be used it was illegal as against public policy. Therefore the contract would be construed to mean the former so as to render it valid so far as the employment of another ferry was concerned rather than the latter which would render the whole agreement absolutely void.³ So where a physician sold his practice to another and agreed not to practice again within a certain territory, it was held that his covenant was not broken by acting in an emergency, with no thought of getting his practice back.

And courts will not, unless the intention is clearly manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other.⁵ They will not construe the agreement so as to work a forfeiture if it can be avoided.⁶

Where one construction would make a contract unusual and extraordinary and another, equally consistent with the language used would make it reasonable and just, the latter will prevail.⁷

§ 402. *Written and Printed Words.*

In the interpretation of a contract of which a portion is printed and a portion written, courts will give greater weight to the written portion than to the printed words, where they are in conflict and tend to different results.¹ The language of

³ Wiggins Ferry Co. v. R. Co., 128 Mo. 224.

⁴ Rawlinson v. Clarke, 14 M. & W. 187.

⁵ Russell v. Allerton, 108 N. Y. 288; Wilson v. Marlow, 66 Ill. 385; Crabtree v. Hagenbaugh, 25 Ill. 233; County of Johnson v. Wood, 84 Mo. 489.

⁶ Franklin Ins. Co. v. Wallace, 93 Ind. 7.

⁷ Stoddard v. Golden, 173 Pac. 707 (Cal.).

¹ 9 Cyc. 584; 13 C. J. 536; First Nat. Bk. v. Greenlee, 166 N. W. 599 (Neb.).

printed blanks prepared for general use is readily assumed to be appropriate in the particular instance without careful examination, and hence not so likely to express the real intention of the parties as the written words specially selected by them for the particular transaction.² Where a typewritten clause conflicts with a printed provision the former will prevail.³ And a printed billhead or letterhead cannot be allowed to control, modify, or alter the terms of a contract clearly expressed in writing below it.⁴ A sent B an unconditional offer to buy certain goods, B wrote back, accepting the offer, the acceptance being unqualified, but written on a letterhead, at the top of which were printed the words, "All sales subject to strikes and accidents." It was held that these words formed no part of the contract.⁵ But this rule only applies where the written and printed parts cannot, upon any reasonable construction, be reconciled.⁶

§ 403. *Grammar and Punctuation.*

Courts will not be precise in following the rules of grammatical construction, for neither false English nor bad Latin will matter when the meaning of the party is apparent.¹ A writing untechnical, ungrammatical, and totally at variance with all the recognized rules of orthography may be valid if there be sufficient words to declare clearly and legally the

² Benj. Prin. of Contr. 107.

³ Soucy v. Obert Co., 180 Ill. App. 69; Heyn v. Ins. Co., 192 N. Y. 1, 84 N. E. 725.

⁴ Sturm v. Boker, 150 U. S. 312.

⁵ Summers v. Hibbard, etc., Co., 153 Ill. 202, 38 N. E. 809, 50 Ill. App. 381; Orth v. Bd. of Education (Pa.), 116 A. 366.

⁶ Michaelis v. Wolf, 136 Ill. 68, 26 N. E. 384; Harper v. Hochstein (U. S.), 278 Fed. 102.

¹ Hancock v. Watson, 18 Cal. 140; Brewery Co. v. Water Co., 34 Mo. (App.) 49; Cowles Co. v. Lowrey, 79 Fed. 331; Wilson v. Wilson. 5 H. L. Cas. 40.

party's meaning.² Thus when the intention is clear "and" may be read "or" and vice versa.³ So where A by writing says he will "give" B a certain sum of money if he will do a certain thing, "give" will be construed as importing a promise not a gift.⁴

Punctuation may sometimes shed light upon the meaning of the parties, but a writing may be examined without such aid;⁵ it is always subordinate to the test and is never allowed to overturn what seems the plain meaning of the whole contract.⁶

§ 404. *Construction Against Party Using Words.*

Courts will construe doubtful words most strongly against the party who used them.¹ This rule is based on the principle that a man is responsible for ambiguities in his own expression and has no right to induce another to contract with him on the supposition that his words means one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage.²

² Cobb v. Hines, Busb. 343, 59 Am. Dec. 559; Inhabitants v. Nichols, 39 Atl. Rep. 389 (Me.).

³ Maguire v. Moore, 108 Mo. 267; Jackson v. Topping, 1 Wend. 388, 19 Am. Dec. 515; Sturm v. Boker, 150 U. S. 312.

⁴ Hamer v. Sidway, 124 N. Y. 538, overruling s. c., 57 Hun. 229; Wilkinson v. Oliveria, 1 Bing. N. C. 490; R. Co. v. Cooper (Tex.), 236 S. W. 811.

⁵ White v. Smith, 33 Pa. St. 186, 75 Am. Dec. 589; Bruensman v. Carroll, 52 Mo. 213; Bunn v. Wells, 94 N. C. 67; Inhabitants v. Nichols, 39 Atl. 338 (Me.).

⁶ Osborn v. Farwell, 87 Ill. 89, 29 Am. Rep. 47; Ewing v. Burnett, 11 Pet. 54; Seay v. McCormack, 68 Ala. 549; Allen v. U. S. Fidelity Co., 193 Ill. App. 193, 269 Ill. 234, 109 N. E. 1095; Corn v. Grant, 201 Mass. 458, 87 N. E. 895.

¹ Barney v. Newcomb, 9 Cush. 46; Noonan v. Bradley, 9 Wall. 394; Evans v. Sanders, 8 Port. 497, 33 Am. Dec. 297; Collison v. Curtner, 216 S. W. 1059 (Ark.); Sandbrook v. Inv. Co. (Mo.), 239 S. W. 543.

² Anson Contr. 253; Fowkes v. Ins. Co., 3 B. & S. 917; Wells v. Carpenter, 65 Ill. 450.

Therefore a deed is construed most strongly against the grantor;³ and where a deed will inure in several ways, the grantee may elect in which way to take it.⁴ And a clause in a promissory note will be construed most strongly against the maker;⁵ a clause in a policy of insurance most strongly against the insurer;⁶ because in each case the party is presumed to have chosen the words used.

But this rule is the last one which courts apply, and will never be resorted to so long as a satisfactory result can be reached by the other rules of construction.⁷ And the rule is applicable only to such words as can be attributed to the one party and not to words that are the common language of both parties.⁸ And the rule is not applied where it would cause a penalty or forfeiture and therefore the condition of a bond is construed favorably for the obligor.⁹

³ *Rung v. Shoneberger*, 2 Watts, 23, 26 Am. Dec. 95; *City of Alton v. Ill. Trans. Co.*, 12 Ill. 38, 52 Am. Dec. 479; *Pike v. Monroe*, 36 Me. 309, 58 Am. Dec. 751; *Com. v. Erie R. R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471; *Dodge v. Walley*, 22 Cal. 224, 83 Am. Dec. 61; *Green Bay Co. v. Hewitt*, 55 Wis. 96, 42 Am. Rep. 701, 12 N. W. 382. So an exception or reservation in a deed is to be construed strictly against the grantor. *Cocheco Man. Co. v. Whittier*, 10 N. H. 305; *Duryea v. Mayor*, 62 N. Y. 592; *U. S. Mortgage Co. v. Gross*, 93 Ill. 483.

⁴ *Jackson v. Hudson*, 3 Johns. 375, 3 Am. Dec. 500.

⁵ *Walker v. Kimball*, 22 Ill. 537; *Massie v. Beiford*, 68 Ill. 290.

⁶ *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; *Reynolds v. Ins. Co.*, 47 N. Y. 597; *Ins. Co. v. Slaughter*, 12 Wall. 404; *Stoddard v. Golden*, 178 Pac. 707 (Cal.), and note 3 A. L. R. 1062.

⁷ *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 367; *Adams v. Warner*, 23 Vt. 411; *County of Johnson v. Wood*, 84 Mo. 509.

⁸ *Beckwith v. Howard*, 6 R. I. 1.

⁹ *Butler v. Wigge*, 1 Wm. Saund. 66; *Chicago, etc., v. Aurora*, 99 Ill. 214; *Bennehan v. Webb*, 6 Ired. 57.

PART IV.

THE DISCHARGE OF THE CONTRACT.

§ 405. INTRODUCTORY.

§ 405. *Introductory.*

Having considered the Formation of the contract, its Operation when formed, and its Interpretation when its terms are disputed by the parties to it, we have next to consider the modes in which the contractual tie may be loosened, and the parties freed from the rights and liabilities which have arisen under the contract. And it will be found that a contract may be discharged in any one of the following ways: I. By agreement. II. By performance. III. By impossibility of performance. IV. By operation of law. V. By breach.

CHAPTER XII.

DISCHARGE BY AGREEMENT.

SECTION 406. Methods of Discharge by Agreement.

(A) WAIVER OR CANCELLATION.

- 407. Executory Agreement may be Waived or Cancelled.
- 408. But Not Executed Contract.
- 409. Exception—Negotiable Instruments.

(B) SUBSTITUTED AGREEMENT.

- 410. Express Substituted Agreement.
- 411. Form of Substituted Agreement.
- 412. Implied Substituted Agreement.
- 413. Express Novation.
- 414. Implied Novation.

(C) CONDITIONS IN CONTRACT.

- 415. Conditions Subsequent.
- 416. Non-fulfillment of term in contract.
- 417. Occurrence of Particular Event.
- 418. Option to Determine Contract.

§ 406. *Methods of Discharge by Agreement.*

It is obvious that a contract which has been entered into between two persons may be put an end to in the same manner as it was created, viz.: by Mutual Agreement.¹ And this may be done (a) by a waiver or cancellation of the contract, (b) by a substituted agreement between the parties, or (c) by a condition in the contract itself.

¹ 9 Cyc. 593.

(a)

WAIVER OR CANCELLATION,

§ 407. *Executory Agreement may be Waived or Cancelled.*

An agreement to discharge a contract must, like all other agreements, have a consideration to support it. Where the contract is executory no further consideration is needed for an agreement to rescind than the discharge of each party by the other from his liabilities under the contract. The consideration for the promise of either party is the abandonment by the other of his rights under the contract.¹

§ 408. *But Not Executed Contract.*

On the other hand, an executed contract, *i. e.*, a contract in which one of the parties has performed all that is due from him, cannot be discharged by a parol waiver. The common law knows nothing of the abandonment of such a claim, except by release under seal, or for a consideration.¹

§ 409. *Exception—Negotiable Instruments.*

To this rule there is an important exception in the case of bills of exchange and promissory notes. The rights of the holder of such instruments may be waived and discharged without any consideration for their waiver, by his surrendering or destroying the instruments with the intention of

¹ Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370; Stryker v. Vanderbilt, 25 N. J. (L.) 482; Blood v. Goodrich, 9 Wend. 68, 24 Am. Dec. 121; Johnson v. Reed, 9 Mass. 78, 6 Am. Dec. 36; Chouteau v. Jupiter Iron Works, 83 Mo. 73; Alden v. Thurber, 149 Mass. 271; Critchfield v. Dailey, 98 Ga. 462, 25 S. W. 576.

¹ 9 Cyc. 593; 13 C. J. 592; Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370; Kellett v. Robie, 99 Wis. 303.

releasing the parties liable upon them,¹ which operates as a gift executed.²

(b)

SUBSTITUTED AGREEMENT.

§ 410. *Express Substituted Agreement.*

A contract may be discharged by an alteration by the parties in its terms which substitutes a new agreement for the old one. The difference between this and the mode of discharge by agreement just mentioned lies in the fact that the first is a total obliteration of the contract, the second is a substitution of a new bond between the parties in place of the old one. A claim under the original contract may then be met by the new agreement so far as the latter operates to alter or rescind the former.¹

The change of rights and liabilities, and consequent extinction of those which before existed, forms the consideration on each side for the new contract.

§ 411. *Form of Substituted Agreement.*

The form in which the new agreement must be, depends as a rule, upon the form of the old.

At common law if the contract was under seal it could not while executory be varied or altered or released or rescinded by a parol executory agreement.¹ But this does not seem now to be the rule in England² nor in this country.³

¹ 9 Cyc. 594.

² Slade v. Nutrie, 156 Mass. 19; Dreifus v. Columbian Ex. Co., 194 Pa. St. 475.

³ 9 Cyc. 594.

¹ 9 Cyc. 596; Brackett Co. v. Lofgren, 167 N. W. 274 (Minn.).

² Steeds v. Steeds, 22 Q. B. Div. 537.

³ 9 Cyc. 597.

“Notwithstanding what was said in some of the old cases, it is now recognized doctrine that the terms of a contract under seal may be varied by a subsequent parol agreement. Certainly, whatever may have been the rule at law, such is the rule in equity.”⁴

But the parol agreement according to many of the decisions must be executed or it will not operate as a discharge or rescission of the specialty.⁵

If the original contract was put in writing merely by agreement of the parties, and not in pursuance of any statutory requirement, the new agreement, in alteration or discharge, is not required to be in writing, and may be proved by parol evidence.⁶ This follows from the principle shown in a previous chapter⁷ that the writing is not the agreement but the evidence of it, and that as the essentials of agreement lie in the expressed intention of the parties and not in the writing, which is the instrument of that expression, the contract may be discharged by a valid expression of the intention to put an end to it.

But if the original agreement was required by the statute of frauds or any other statute, to be in writing, the new contract must also be in writing.⁸ But even this class of written agreements may be discharged by an oral agreement which has been executed.⁹

⁴ Canal Co. v. Ray, 101 U. S. 522.

⁵ Unthenk v. Henry County Turnp. Co., 6 Ind. 126; *McMurphy v. Garland*, 47 N. H. 322, 323; *Buell v. Miller*, 4 N. H. 196; *McKenzie v. Harrison*, 120 N. Y. 260.

⁶ 9 Cyc. 598; *Roxbury Painting Co. v. Nute*, 123 N. E. 391 (Mass.); *Clark v. Sullaska*, 174 Pac. 505 (Okla.).

⁷ Ante, Chap. III.

⁸ *Goss v. Lord Nugent*, 5 Barn. & Adol., 65; *Blood v. Goodrich*, 9 Wend. 68, 24 Am. Dec. 121; *Swain v. Seamens*, 9 Wall. 272; *Hill v. Blake*, 97 N. Y. 216; *Bonecamp v. Starbuck*, 25 Okla. 483, 106 Pac. 839, and note in L. R. A. 1917 B. 144; *Walter v. Bloede Co.*, 94 Md. 80.

⁹ *McKenzie v. Hansen*, 120 N. Y. 260.

§ 412. *Implied Substituted Agreement.*

The rescission may be implied as well as express. Thus if agreements be made between the same parties concerning the same matter, and the terms of the latter are inconsistent with those of the former, so that they cannot subsist together, the latter will be construed to discharge the former.¹ But the intention to discharge the original contract must distinctly appear from the inconsistency of the new terms with the old ones. By a mere postponement of performance, for the convenience of one of the parties, the contract is not discharged.²

§ 413. *Express Novation.*

A contract is frequently discharged by a change in the parties thereto, whereby a new party is substituted for a previous one by agreement of all three, while the terms remain the same. This is called a Novation¹ which receives its most frequent illustration in the acceptance by policyholders of the transfer of their policies and in changes in firms of partners.

But other examples are frequent. A sells B a wagon; B afterwards sells it to C, who agrees to pay A the price which B had agreed to pay A for it, and A agrees to take C as his debtor for the price. The debt due to A from B is extinguished.² A owes B \$100, and B owes C \$100; the three meet, and it is agreed between them that A shall pay C the \$100. B's debt is extinguished, and C may recover that sum

¹ Murray v. Harway, 56 N. Y. 337; Wheeden v. Fiske, 50 N. H. 125; Harrison v. Polar Star Lodge, 116 Ill. 279.

² Lawson v. Hogan, 93 N. Y. 39; McCombs v. McKennan, 2 W. & S. 216; Bacon v. Cobb, 45 Ill. 47.

¹ Heaton v. Angier, 7 N. H. 397, 28 Am. Dec. 353; Guichard v. Brande, 57 Wis. 534; McClellan v. Robe, 93 Ind. 298; Cadens v. Teasdale, 53 Vt. 469, 38 Am. Rep. 697; Collyer v. Moulton, 9 R. I. 90.

² Heaton v. Angier, *supra*.

against A. In the case supposed, C gives a consideration for the promise of A to him in the satisfaction and discharge of the debt of B, and receives a consideration for his discharge of B in the promise of A; A receives a consideration for his promise to C in the satisfaction and discharge of his debt to B; B receives consideration for the discharge of his debt to A in the satisfaction and discharge of his debt to C.³

There must be three parties, each of whom must have the legal capacity to contract.⁴ All the parties to it must consent to it,⁵ for it requires the consent of the parties to the old contract to rescind the old one, and of the parties to the new contract to create the new one.⁶ And it must appear that the original indebtedness was extinguished.⁷

§ 414. *Implied Novation.*

The novation may take place through the conduct of the parties indicating an acquiescence in a change of liability, as well as by an express agreement. Thus if A has entered into an agreement with B and C, and B and C agree among themselves that C shall retire from it and cease to be liable upon it, A may either insist upon the continued liability of C, or he may treat the agreement as broken and discharged by the

³ Blankenship v. Tillman, 18 S. W. Rep. 646 (Tex.); Harvey Co. v. Herriman Co., 39 Mo. (App.) 214; Casey v. Miller, 32 Pac. 195. The statute of frauds does not apply to a contract of novation. Mulcrane v. Amer. Lumber Co., 55 Mich. 626; Realty Co. v. Ryan (Mo.), 232 S. W. 126.

⁴ Fuller v. Stout, 166 Pac. 898 (Okla.).

⁵ Brown v. Croy, 74 Mo. (App.) 467; Butterfield v. Hartshorn, 7 N. H. 345, 26 Am. Dec. 741; Ayer v. Kelner, 148 Mass. 418; Reid v. Degener, 82 Ill. 508.

⁶ Murphy v. Hanrahan, 50 Wis. 485; Richardson Drug Co. v. Dungan, 46 Pac. Rep. 227 (Colo.).

⁷ Jaudon v. Randall, 47 N. Y. S. Ct. 374; Badger Lumber Co. v. Meffert, 59 Mo. (App.) 437; Lutz v. Williams, 91 S. E. 460 (W. Va.); Klinkoosten v. Mundt, 36 S. D. 595, 156 N. W. 85, and note in L. R. A. 1918 B. 113.

renunciation of his liabilities by one of the parties to it. If, however, A, after he becomes aware of the retirement of C, continues to deal with B as though no change had taken place, he will be considered to have entered into a new contract to accept the sole liability of B, and will not be entitled to hold C to his original agreement.

Such a transaction frequently occurs upon a change in a firm of partners; the debt of the original firm may, by the creditor's conduct in his dealings with the new firm,¹ be effectually transferred to the new firm, so as to render them liable to the creditor in substitution of the former.²

(c)

CONDITIONS IN CONTRACT.

§ 415. *Conditions Subsequent.*

A condition subsequent is one that terminates an obligation after it has arisen. The obligation has arisen and the defendant therefore commits a breach unless he can show that it has ceased.¹

A contract may provide, either expressly or impliedly, that upon the happening of some event or contingency it shall cease and be discharged. These circumstances may be the

¹ As, for example, by his accepting a note for his debt from the new firm. *Waydell v. Luer*, 3 Denio, 410; overruling s. c., 5 Hill, 448.

² *Hart v. Alexander*, 2 M. & W. 484; *Thompson v. Percival*, 5 B. & Ad., 925; *Luddington v. Bell*, 77 N. Y. 141; *Millerd v. Thorn*, 56 N. Y. 402; *Stone v. Chamberlain*, 20 Ga. 259; *Powell v. Charless*, 34 Mo. 485; *Hallensleben v. Piano Co.* (Cal.), 201 P. 942.

¹ *Ashley Contr.* § 71. This author criticises this term, maintaining that all these though called subsequent are really conditions precedent. By using this form the burden of proof is changed, but that is all. *Id.* Thus a clause in a fire insurance policy providing that failure to occupy the premises or an occupancy increasing the risk shall render the policy void is, he says, merely a condition, not a discharge. The promise of the company is really to pay upon the condition precedent that these things did not happen. *Id.* § 89.

non-fulfillment of a specified term of the contract; the occurrence of a particular event; or the exercise by one of the parties of an option to determine the contract.

§ 416. *Non-fulfillment of Term.*

By the terms of the agreement the non-fulfillment of a certain term in it may give to one of the parties the right to treat it as discharged. Thus, chattels may be purchased under an agreement that if on examination they do not answer the description under which they are sold, they may be returned to the seller within a certain time. The effect of such a condition is to vest the property in the buyer subject to a right of rescission in a particular event, when it reverts in the seller, and any loss or damage suffered by the property during that time will fall on the seller,¹ unless it was caused by the fault of the buyer, in which event his right of return is lost.²

§ 417. *Occurrence of Particular Event.*

The parties may introduce into the terms of their agreement a provision that the fulfillment of a condition or the occurrence of an event shall discharge either one or both from further liabilities under the contract.¹ Such a provision is well illustrated by the case of a bond, which is a promise subject to, or defeasible upon, a condition expressed

¹ Head v. Tattersall, L. R. 7 Ex. 7; Hunt v. Wyman, 100 Mass. 198; McKinney v. Bradlee, 117 Mass. 321; Kimball v. Vroman, 35 Mich. 327; Lyons v. Stills, 37 S. W. 280 (Tenn.).

² Ray v. Thompson, 12 Cush. 281. Where goods are sold on condition that title shall not pass until paid for, and possession delivered to vendee, the destruction of the goods before time for payment does not release from liability to pay. Tufts v. Thompson, 45 Mo. (App.) 42; Tufts v. Griffin, 12 S. E. 68 (N. C.); Burnley v. Tufts, 66 Miss. 48, 14 Am. St. Rep. 540. Contra: Bishop v. Minderhout, 128 Ala. 162, 29 South Rep. 12; Moniteau City Mill Co. v. Butler, 109 Ga. 469, 34 S. E. 565. Criticised in 13 Harv. L. Rev. 608.

¹ Gray v. Gardner, 17 Mass. 188.

in the bond. So, leases are usually made subject to conditions of discharge, on the part of the lessor, upon default in payment of rent or some other breach of a covenant and on the part of the lessee, upon the premises being destroyed by fire or rendered uninhabitable or not kept in repair; an insurance policy provides that it shall come to an end if the premiums are not paid, or the risk is increased, the house is left vacant, etc.²

A provision for discharge may be implied as well as express, as in the case of a common carrier, whose obligation is that of an insurer of the safe delivery of the goods intrusted to his care. But he is not liable for losses caused by the "act of God" or the "public enemy." These events are implied terms in every contract made by a carrier, and their occurrence exonerates him from liability for any losses incurred through their agency.³ These exceptions from the general liability of the common carrier being a known and understood term in every contract which he makes, the discharge arising from such causes is to be distinguished from discharge arising from the subsequent impossibility of performance not expressly provided against in the terms of a contract, with which we shall deal hereafter.⁴

§ 418. *Option to Determine.*

An agreement may provide that it shall be determinable at the option of one of the parties upon certain terms. Contracts of hire of personal services are usually made determinable by notice to be given by either party,¹ and in a contract of service, not limited to any time, there is an implied provision that it may be terminated by either party upon a reasonable notice.²

² Moore v. Ins. Co., 62 N. H. 240; Kyte v. Ins. Co., 149 Mass. 116.

³ Lawson Bail., Chap. XI.

⁴ See Chap. XIV.

¹ Lawson Rights, Rem. & Pr., § 2511.

² Ward v. Ruckman, 34 Barb. 419.

CHAPTER XIII.

DISCHARGE BY PERFORMANCE.

SECTION 419. Introductory.

(A) PERFORMANCE.

- 420. Performance Must Follow Terms of Contract.
- 421. Rule in Equity.
- 422. Time of Performance.
- 423. Rule in Equity.
- 424. Performance of Conditional Promises—In General.
- 425. Conditional Upon Time or Future Event.
- 426. Conditional Upon Request, Demand or Notice.
- 427. Conditional Upon Act of Third Person.
- 428. Conditional Upon Will of Promisor.
- 429. Performance to "Satisfaction" of Promisor.

(B) PAYMENT.

- 430. Non-Payment of Debt When Due.
- 431. Payment by Negotiable Instrument.
- 432. Payment in Forged or Worthless Notes or Counterfeit Coins.
- 433. Sending Money by Post.
- 434. Effect of Giving Receipt.
- 435. Appropriation of Payments.

(C) TENDER.

- 436. Tender When a Discharge.
- 437. Requisites of Valid Tender.
- 438. When Tender Not Necessary.

§ 419. *Introductory.*

A contract may be discharged by performance in accordance with its terms. Where a promise is given upon an executed consideration, the performance of his promise by the promisor discharges the contract; all has been done on

both sides that could be required to be done. But, where one promise is given in consideration of another, performance by one party does not necessarily discharge the contract, though it discharges him who has performed his part from doing more. Each must have done his part in order that performance may operate as a discharge of both. Performance of a contract for the delivery of money only is called Payment.¹

(a)

PERFORMANCE.

§ 420. *Performance Must Follow Terms of Contract.*

By the common-law rule, to discharge a promise by performance, the performance must be in strict accordance with the terms of the contract.¹ This is still true of commercial contracts.² A contract for the sale of chattels can only be performed by the delivery of the exact quantity contracted for,³ of the quality bargained for,⁴ in the mode specified in the contract, and at the place agreed upon.⁵

¹ See post, § 430.

¹ 9 Cyc. 601.

² *Norrington v. Wright*, 115 U. S. 188.

³ *Downer v. Thompson*, 2 Hill, 137; *Dennett v. Short*, 7 Greenlf. 150, 20 Am. Dec. 356; *Roberts v. Beatty*, 2 P. & W. 63, 21 Am. Dec. 410; *Stevenson v. Bingin*, 49 Pa. St. 36. Sometimes the quantity of goods to be delivered is expressed with the addition of "about," "more or less," etc., which gives to the seller some reasonable limits of allowance in the performance of his contract, according to the circumstances of each case. *Day v. Cross*, 59 Tex. 595; *Swepson v. Summery*, 64 N. C. 293; *Holland v. Rea*, 48 Mich. 218; *Cabot v. Winsor*, 1 Allen, 546; *Mills Co. v. Rahoid*, 29 Pa. Dist. 499.

⁴ A party cannot tender a different article than that called for by the contract, even though it is a better article. *Halpin v. Manny*, 33 Mo. (App.) 388; *King v. Rochester*, 39 Atl. Rep. 256 (N. H.).

⁵ *Savage Manfg. Co. v. Armstrong*, 19 Me. 147; *Clark v. Cuson*, 3 Head. 55; *Krafts v. Hurtz*, 11 Mo. 109.

§ 421. *Rule in Equity.*

But in equity it has always been held that where the agreement is substantially performed, the party may recover as for a complete performance less such damages as the other party may have suffered on account of the failure to make complete performance, and the equity rule has been generally adopted in the case of building contracts.¹

The omissions or deviations must however be the result of mistake or inadvertence and not intentional, or fraudulent; they must be slight and susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for.²

“They must not be substantial and running through the whole work, so as to be remediless, and defeat the object of having the work done in a particular manner. And these are questions of fact for the jury or trial court. It may seem a harsh doctrine to hold that a man who has built a house shall have no pay for it, but the other party can well say: ‘I never made any such agreement. I agreed to pay you if you would build my house in a certain manner which you have not done.’ The fault is with the one who voluntarily violates his contract.”³

In some of the cases the liability to pay for work and materials not according to the agreement is placed on the ground of *quasi-contract*.⁴

¹ Patterson v. Judd, 27 Mo. 563; Houston v. Myer, 5 Blackf. 89; Goldsmith v. Hand, 26 Ohio St. 101; Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; Wolfe v. Howe, 20 N. Y. 197, 75 Am. Dec. 500; Hayward v. Leonard, 7 Pick. 181, 29 Am. Dec. 269; Porter v. Woods, 3 Humph. 56, 39 Am. Dec. 153; Gleason v. Smith, 9 Cush. 484, 57 Am. Dec. 62; Nolan v. Whitney, 88 N. Y. 648; Rees v. Smith, 1 Ohio, 124, 13 Am. Dec. 599; Katz v. Bedford, 77 Cal. 319.

² Gillespie Tool Co. v. Wilson, 123 Pa. St., 19; Van Elief v. Van Vechter, 130 N. Y. 571.

³ Elliott v. Caldwell, 43 Minn. 357.

⁴ See ante, Chap. II.

§ 422. *Time of Performance.*

At common law, "time was always of the essence of the contract." If A made a promise to B whereby he undertook to do a certain thing by a certain day in consideration that B would thereupon do something for him, B was discharged from his promise if, by the date named in the contract, A's promise was unfulfilled. And if B's part of the contract had been executed, A's performance made after the time stipulated was not performance in the eye of the law but a satisfaction for the breach which had taken place.¹ But in the case of agreements to deliver goods or to manufacture articles, if the contract does not so stipulate,² time is not deemed to be of its essence,³ unless it appears from the language used or the object of the agreement that the specified time is as much the essence of the contract as the manner of the performance.⁴ Where the performance is to be on a certain day the party has the whole of that day to do it in.⁵ Where it is to be within a specified time, he has until the last moment of the last day.⁶

Where there is no time fixed by the contract, the law implies that the performance is to take place within a reasonable time.⁷

¹ Leake Contr. 834; Dermott v. Jones, 23 How. 220.

² Bennett v. Hyde, 28 Pac. Rep. 104 (Cal.); Jenks v. Mfg. Co. (Md.), 115 A. 123.

³ Kirchoff v. Voss, 67 Tex. 320; Watson v. Walker, 67 Tex. 651.

⁴ Nesbitt v. Pearson, 33 Ala. 668; Warren v. Bean, 6 Wis. 120; Rouse v. Lewis, 4 Abb. App. 121; Underwood v. Wolf, 131 Ill. 425; Hull Coke Co. v. Empire Coal Co., 113 Fed. 256; K. C. v. Spitcanfsky (Mo.), 239 S. W. 808.

⁵ Leake Contr. 834.

⁶ Curtis v. Blair, 26 Miss. 309, 59 Am. Dec. 257; Startup v. Macdonald, 6 Man. & G. 593.

⁷ 9 Cyc. 611; 13 C. J. 683; Carroll v. Mundy, 170 N. W. 790 (Ia.)

§ 423. *Rule in Equity.*

Equity looks into the intention of the parties, so as to ascertain whether in fact the performance of the contract was meant to depend upon A's promise being fulfilled to the day, or whether a day was named in order to secure performance within a reasonable time. If the latter is found to be the intention of the parties, equity will not refuse to A the enforcement of B's promise if his own was performed within a reasonable time.¹ But while equity will not regard the time specified as of the essence of the contract, still the parties by express agreement may make it so, and in case they do, equity will not relieve the party in default.²

§ 424. *Performance of Conditional Promises—In General.*

A promise may be conditional, *i. e.*, where the performance is not due immediately, but becomes so only after the happening of a future event. In such cases the condition precedent must take place before the party can be in default for not performing his promise.¹

§ 425. *Conditional Upon Time or Future Event.*

The promise may be conditioned to be performed at a future time, and here the specified time must elapse before performance can become due.¹

¹ 9 Cyc. 605; 13 C. J. 686.

² 9 Cyc. 606; 13 C. J. 686.

¹ Barry v. Alsbury, 6 Litt. 151; Balt., etc., R. Co. v. Polly, 14 Gratt. 447; Eldridge v. Rowe, 7 Ill. 91, 42 Am. Dec. 41; Oakley v. Morton, 11 N. Y. 25, 62 Am. Dec. 49; Galt v. Swain, 9 Gratt. 633, 60 Am. Dec. 311.

¹ Cleveland v. Sterrett, 70 Pa. St. 204. An agreement to supply goods, silent as to its duration, may be terminated by either party after a reasonable time and upon reasonable notice. Southern Pac. Co. v. Spring Valley Water Co., 159 Pac. 865, 173 Cal. 201.

The promise may be conditional upon the happening of some event or contingency which is altogether uncertain;² as (for illustrations) a contract to purchase, "provided titles can be procured and made;"³ or a subscription to a purpose, provided a certain further sum is subscribed,⁴ or a promise to pay money provided it is realized out of a certain specified fund.⁵

But when money is due and it is agreed that it shall be paid upon the happening of a future event, the fact that the event does not happen will not discharge the debtor for the obligation to pay.⁶ Thus where a note given for the price of the rigging of a vessel provided for its payment "ninety days after its first return trip" and the vessel was lost on the voyage, the note was held to be payable ninety days after the time usually required for the trip.⁷

And where B acknowledged that he owed A a certain sum, and promised to pay it as soon as a crop should be sold or the money could be raised from any other source, it was held that the money was due within a reasonable time:

"No time having been specified within which the crop should be sold or the money raised otherwise, the law annexed as an incident that one or the other should be done within reasonable time, and that the sum admitted to be due should be paid accordingly. Payment was not conditional to the extent of depending wholly and finally upon the alternatives mentioned. The stipulations secured to the defendants a reasonable amount of time within which to procure in one

² *Atlantic R. Co. v. Johnson*, 31 N. E. 903; *Cole v. Bryant*, 18 South. 190 (Miss.); *Perry v. Cooper*, 8 Mo. 206; *Peerless Glass Co. v. Pacific Co.*, 121 Cal. 641, 54 Pac. 101.

³ *Lacy v. Hall*, 37 Pa. St. 360.

⁴ *New York, etc., R. Co. v. DeWolf*, 31 N. Y.

⁵ *Rogers v. Law*, 1 Black. 253; *Staats v. Hodges*, Hill & D. 211; *Smth v. Ross*, 51 Mich. 116, 16 N. W. Rep. 258.

⁶ *Ubsdell v. Cunningham*, 22 Mo. 124; *Noland v. Bull*, 24 Ore. 479, 33 Pac. 983; *Days v. Hammond*, 60 N. W. 455 (Mich.); *Richmond Ice Co. v. Ice Co.*, 38 S. E. 141 (Va.).

⁷ *Randall v. Johnson*, 59 Miss. 317, 42 Am. Rep. 365.

mode or the other the means necessary to meet the liability. Upon the occurrence of either of the events named or the lapse of such time, the debt became due. It could not have been the intention of the parties that if the crop were destroyed, or from any other cause could never be sold and the defendants could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice.⁸

When a person agrees to do a certain thing upon the happening of a certain event which may become known to him or which he may himself find out, he is not entitled to notice of it; but it is otherwise when he agrees to do a thing peculiarly within the knowledge of the other.⁹

§ 426. *Conditional Upon Request, Demand or Notice.*

The promise may be conditional upon a request or demand of performance; the making of the request or demand is then necessary and in an action for a breach of the contract, must be alleged and proved.¹ Unless otherwise provided the demand need not be in writing.²

The promise may be conditional upon notice of some matter being given to the promisor, in which case the required notice is as requisite as the demand in the last case.³ And even when not expressly stipulated for, the requirement of notice may be implied from the nature of the transaction, as where the matter lies peculiarly within the knowledge of the other party.⁴

⁸ Nunez v. Dautel, 19 Wall. 560.

⁹ Vyse v. Wakefield, 6 M. & W. 442.

¹ West v. Murph, 3 Hill, 284; Greenwood v. Curtis, 6 Mass. 355, 4 Am. Dec. 145; Mitchell v. Gregory, 1 Bibb, 449, 4 Am. Dec. 655; Beners v. Howard, Tayl. 149, 1 Am. Dec. 583.

² Colby v. Reed, 99 U. S. 560.

³ Quarles v. George, 22 Pick. 400; Johnson v. Moore, 1 Blackf. 253.

⁴ Vyse v. Wakefield, 6 M. & W. 453; Makin v. Watkinson, L. R. 6 Ex. 25; Birdseye v. Davis, 2 McCord, 296.

“A request is quite immaterial, unless the parties to a contract have stipulated that it shall be made; if they have not done so, the law requires no notice or request; but the debtor is bound to find out the creditor and pay him.”⁵

§ 427. *Conditional Upon Act of Third Person.*

The promise may be conditional upon the act or will of a third party.¹ Thus, where a building contract provides that payment shall only be made on the certificate of approval of the architect, no claim for payment can be made unless the certificate be given.² In the absence of fraud, or such gross mistake as is equivalent to bad faith³ or a failure to exercise an honest judgment in refusing the certificate,⁴ the refusal is conclusive against the builder's right to claim the stipulated compensation.⁵ So, where quantity or price or quality, it is agreed by the parties, is to be left to the opinion and determination of a third person, his judgment or estimate is binding, in the absence of fraud or mistake of fact.⁶

⁵ *Walton v. Maskell*, 2 D. & L. 410, 415, 13 M. & W. 548.

¹ *Culley v. Hardenburg*, 1 Denio, 508; *Wyckoff v. Meyers*, 44 N. Y. 143.

² *Morgan v. Birnie*, 9 Bing. 672; *Clarke v. Watson*, 18 C. B. (N. S.) 278; *Smith v. Brady*, 17 N. Y. 173; 72 Am. Dec. 442. As to what is a sufficient certificate, see note to *Hennebique Const. Co. v. Boston Cold Storage Co.*, 230 Mass. 456, 119 N. E. 948, and note in L. R. A. 1918 F. 377.

³ *Lynn v. Railroad*, 60 Md. 404, 45 Am. Rep. 741; *Belt, etc., R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318; *Tetz v. Butterfield*, 54 Wis. 242, 41 Am. Rep. 29; *Chism v. Schipper*, 51 N. J. (L.) 1; *Ogden v. U. S.*, 60 Fed. Rep. 725; *Crane Elevator Co. v. Clark*, 80 Fed. Rep. 705; *Condon v. R. Co.*, 14 Gratt. 302; *Nolan v. Whitney*, 88 N. Y. 648.

⁴ As for example, refusing to investigate a disputed point. *Van Hook v. Burns*, 38 Pac. Rep. 765 (Wash.).

⁵ *Sweeney v. U. S.*, 109 U. S. 618. But see *Yates v. Ballentine*, 56 Mo. 530.

⁶ *Keeble v. Black*, 4 Tex. 69; *Baasen v. Blake*, 7 Wis. 576; *Nofsinger v. Ring*, 71 Mo. 149, 36 Am. Rep. 456; *O'Reilly v. Kerns*, 52 Pa. St. 214; *Crane v. Roberts*, 5 Me. 419; *Dustan v. Andrew*, 44 N. Y. 72; *Vaughan v. Howe*, 20 Wis. 497.

§ 428. *Conditional Upon Will of Promisor.*

A promise conditional upon the will of the promisor cannot make a binding agreement, for the promisor in such a case has not bound himself to do anything¹—as for example a promise by a master to pay a servant what he shall think right² or to work as long as the promisor “can make it pay”³ or to build such a house as he shall think fit,⁴ or to pay when one’s circumstances enable him to do so⁵ or to accept a deed when he is satisfied with the title.⁶ So a provision in a chattel mortgage, that the mortgagee may take possession, whenever he deems himself unsafe or insecure, gives him an absolute discretion, which does not depend upon the reasonableness of his action.⁷

But an agreement to pay when one is “able” is valid, though it imposes on the creditor the proving of the condition. Where a New York Judge owing about \$15,000 wrote to his creditor an offer of compromise that “I will pay the balance when I shall be able to do so,” and nothing was proved as to his ability except that he was in receipt of a salary of \$1,250 a month, it was held that the condition was not proved.⁸ And in another case of this kind it was said:

“Proof that the defendant had property equal to or greater than the amount of the debt, would not show that he was able to pay. . . . It might be consistent with utter insolvency or to deprive him of it would take away his means of livelihood as effectually as depriving a mechanic of his tools would deprive him of means of support. . . . It is not con-

¹ Tolmie v. Dean, 1 Wash. 57; Rosher v. Williams, L. R. 20 (Eq.) 260; Savage Manfg. Co. v. Armstrong, 19 Md. 147; Butler v. Mill Co., 28 Minn. 205, 41 Am. Rep. 277.

² Ante, Chap. I.

³ Davie v. Lumbermans Co., 53 N. W. Rep. 625 (Mich.).

⁴ Rosher v. Williams, L. R. 20 Eq. 210.

⁵ Nelson v. Von Bonnhorst, 29 Pa. St. 352.

⁶ Werner v. Bergman, 28 Kas. 60, 42 Am. Rev. 152, 9 Cyc. 621.

⁷ Averett v. Lipscombe, 76 Va. 404; Church v. Shanklin, 95 Cal. 626.

⁸ Work v. Beach., 13 N. Y. S. 678, 12 Id. 16.

templated by the parties that the debtor will pay the debt out of earnings necessary for the support of himself or his family or to the prejudice of other creditors whose debts are absolute and unconditional.”⁹

§ 429. *Performance to “Satisfaction” of Promisor.*

An agreement to work for another or to manufacture goods to the “satisfaction” of the person who promises to receive and pay for them furnishes a frequent illustration of the principle of the last section. In *Brown v. Foster*,¹ plaintiff, a tailor, had agreed to make defendant a suit of clothes to his satisfaction. When the clothes were delivered he was not satisfied with them and returned them. In an action for their price, plaintiff proved by other tailors that the clothes were, barring a slight defect which could be easily remedied, well made. But the court held that this did not matter.

“If the plaintiff saw fit to do work upon articles for the defendant, and to furnish materials therefor, contracting that the articles, when manufactured, should be satisfactory to the defendant, he can recover only upon the contract as it was made; and even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another, who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered.”

In *Zaleski v. Clark*,² an artist had agreed to make a marble bust of the defendant's deceased husband which would

⁹ Tebo v. Robinson, 100 N. Y. 29, 2 N. E. 383.

¹ 113 Mass. 136.

² 44 Conn. 218.

be satisfactory to her. When the work was completed she refused to take and pay for it and the artist sued her for the price, but without success.

“The plaintiff undertook to make a bust which should be satisfactory to the defendant. The case shows that she was not satisfied with it. The plaintiff has not yet then fulfilled his contract. It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable: she, and not the court, is entitled to judge of that. The contract was not to make one that she ought to be satisfied with, but to make one that she would be satisfied with. Nor is it sufficient to say that the bust was the best thing of the kind that could possibly be produced. A contract to produce a bust, perfect in every respect, and one with which the defendant ought to be satisfied is one thing; an undertaking to make one with which she will be satisfied is quite another. The former can only be determined by experts; the latter can only be determined by the defendant herself.”

These two cases show that the courts refuse to say that where a man agrees to pay if he is satisfied with a thing he should be compelled to pay on proof that some one else is satisfied with it.³

³ *Rhodes v. Land Co.*, 105 Mo. (App.) 281. The same has been held as to a portrait, *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351; a cabinet organ, *Barry v. Rainer*, 57 N. Y. Suppl. 766; *Pennington v. Howland*, 21 R. I. 65, 41 Atl. Rep. 891, 79 Am. St. Rep. 774; *McClane v. Briggs*, 58 Vt. 82; a set of artificial teeth, *Hartman v. Blackburn*, 7 Pittsb. Leg. J. (Pa.) 140; a carriage, *Andrews v. Belfield*, 2 C. B. N. S. 779; a steam-heater for a house, *Adams Radiator, etc., Works v. Schnader*, 155 Pa. St. 394, 26 Atl. Rep. 745; a play to be written by an author for an actor, *Haven v. Russell*, 34 N. Y. Suppl. 292; *Glenny v. Lacy*, 1 N. Y. Suppl. 513; a literary or scientific article for an encyclopedia, *Walker v. Edward Thompson Co.*, 56 N. Y. Suppl. 326; a design for a bank-note, *Gray v. Alabama Nat. Bank*, 10 N. Y. Suppl. 5; 14 N. Y. Suppl. 155; a horse, *Housding v. Solomon*, 127 Mich. 654, 87 N. W. Rep. 57; a bookcase, *McCarran v. McNulty*, 7 Gray, 139; a harvesting machine, *Wood Reaping, etc., Co. v. Smith*, 50 Mich. 565, 15 N. W. Rep. 906, 45 Am. Rep. 57; a steam fire engine, *Silsby Mfg. Co. v. Chico*, 24 Fed. Rep. 893; a cord binder, *McCormick Harvesting Mach. Co. v. Chesrown*, 33 Minn. 32, 21 N. W. Rep. 846; a steamboat, *Gray v. New Jersey Cent. R. Co.*, 11 Hun. 70; an elevator, *Singerly v. Thayer*, 108 Pa. St. 291, 2 Atl. Rep. 230, 56 Am. Rep. 207; steam fans for exhausting smoke, *Exhaust Ventilator Co. v. Chicago, etc., R. Co.*, 66 Wis. 218, 28 N. W. Rep. 343, 57 Am. Rep.

The same conclusion is reached by the courts when a person agrees to pay or employ another if his services are "satisfactory."⁴

The promisor however must act honestly and in good faith; his dissatisfaction must be actual not feigned; real not merely pretended.⁵

"To be dissatisfied must be a verity and not a pretext. It is not 'I will not accept it, will not have it,' but it is: 'It is not satisfactory,' or 'I am really and honestly dissatisfied with it'."⁶

If the purchaser is in fact satisfied but fraudulently and in bad faith declares that he is not, the condition is performed;⁷ for the purpose, for example, of evading payment of the price, a dishonest declaration of dissatisfaction would be nugatory.⁸ He must, if a test is necessary to determine its fitness, give that test or allow it to be made.⁹ If an employer agrees to pay for services if they are satisfactory to him, he will certainly be under an obligation to give the employee a trial. So if a man should order a suit of clothes and agree to pay for them if they suited him, he would cer-

257; a printing press, *Campbell Printing Press Co. v. Thorp*, 36 Fed. Rep. 411; a grain binder, *Plano Mfg. Co. v. Ellis*, 68 Mich. 101, 35 N. W. Rep. 841; *Seeley v. Welles*, 120 Pa. St. 69, 13 Atl. Rep. 736; a machine for generating gas, *Aiken v. Hyde*, 99 Mass. 183; a fanning mill, *Goodrich v. Van Nortwick*, 43 Ill. 445.

⁴ *Allen v. Mutual Compress Co.*, 101 Ala. 574, 14 South. Rep. 362; *Bush v. Koll*, 2 Colo. App. 48, 29 Pac. Rep. 919; *Koehler v. Buhl*, 94 Mich. 496, 500, 54 N. W. Rep. 157; *Kendall v. West*, 196 Ill. 221, 63 N. E. Rep. 683; *Gwynne v. Hitchner*, 66 N. J. L. 97, 48 Atl. Rep. 571, 67 N. J. L. 651, 52 Atl. Rep. 997; *Tiffany v. Pacific Co.*, 182 Pac. 428 (Cal.), and note in 6 A. L. R. 1497.

⁵ *Daggett v. Johnson*, 49 Vt. 345; *Singerly v. Thayer*, 108 Pa. St. 297; *Hartford Manfg. Co. v. Brush*, 43 Vt. 528; *Gwynn v. Hitchner*, 67 N. J. L. 654.

⁶ *McCartney v. Badovinac*, 160 Pac. 190 (Colo.).

⁷ *Silsby Manfg. Co. v. Chico*, 24 Fed. Rep. 893.

⁸ *Adams Radiator Co. v. Schnader*, 26 Atl. Rep. 744.

⁹ *Balt., etc., R. Co. v. Brydon*, 65 Md. 198, 57 Am. Rep. 318; *Exhaust Ventilator Co. v. R. Co.*, 66 Wis. 218; *Manning v. Glendenning*, 15 Wis. 50; *Mackay v. Dick*, 6 App. Cas. 251; *Crane Elevator Co. v. Clark*, 80 Fed. Rep. 705.

tainly be obliged to try them on.¹⁰ An article to be manufactured could not be rejected before it was substantially completed, so that the promisor will be able fairly to determine whether it was or would be satisfactory to him.¹¹ But having decided that it is not satisfactory, the buyer is not obliged to give the seller an opportunity of making it so.¹²

A distinction has been made in some cases between agreements which involve the feelings, taste, or sensibility of the promisor, and those considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. Here it is held the adequacy of the grounds of his decision should be subject to the determination of a jury.¹³ But this view is not a logical one, if it is conceded that persons have a right to make their own contracts. If in this class of cases, the promisor has determined to preserve an unqualified option, and was not willing to leave his freedom of choice exposed to any contention or subject to any contingency, resolved to permit no right in any one else to judge for him or to pass on the wisdom or unwisdom, the justice or injustice of his action and would not enter into a bargain except upon the condition of reserving the power to do what others might regard as unreasonable, why should a court or jury make a different contract for him?

In the case of a sale of goods to be accepted or paid for, if "satisfactory," the condition is a suspensory one,¹⁴ *i. e.*, it suspends the obligations of both parties until the purchaser's satisfaction is gained or waived.¹⁵ Hence that the goods are not satisfactory does not give him a right to

¹⁰ Daggett v. Johnson, 49 Vt. 345.

¹¹ Singerly v. Thayer, 108 Pa. St. 297.

¹² Aiken v. Hyde, 99 Mass. 183, Brown v. Foster, *supra*.

¹³ Hawkins v. Graham, 149 Mass. 284; Wood Co. v. Smith, 50 Mich. 565; Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387; and see 9 Cyc. 621.

¹⁴ See *ante*.

¹⁵ Exhaust Co. v. R. Co., 66 Wis. 218; Phelps v. Willard, 16 Pick. 29.

reject them and claim damages for breach of contract,¹⁶ nor to keep them and recover damages in an action for the purchase price.¹⁷ Thus where A agrees to make B a "satisfactory" coat, if A makes the coat, B is not obliged to perform his promise (*i. e.*, pay for it) unless it is satisfactory to him. B cannot keep the coat and sue A because it is not satisfactory, nor can B reject it and sue A for not making him a satisfactory coat, nor, it would seem, if A fails to make a coat at all can B sue A; for in such a case there is no mutuality, B not being bound to anything. Nothing can be more contradictory to the idea of contractual obligation, than a liability on the part of one of the promisors to perform or not as he pleases.¹⁸

(b)

PAYMENT.

§ 430. *Non-payment of Debt When Due.*

Payment is the performance of a contract for the delivery of money. A contract to pay money is discharged by the payment or the tender of either money or a negotiable instrument at the time and in the manner provided by the contract. A party relying on or pleading payment must prove it, as it is a defense peculiarly within his knowledge.¹

A contract for services on a particular work or for a definite time, silent as to the time of payment is considered as

¹⁶ As would be the case if there was a warranty that the goods were fit for the purpose and they were not. *Shupe v. Collender*, 15 Atl. Rep. (Com.) 405.

¹⁷ *Campbell Printing Press Co. v. Thorp*, 36 Fed. Rep. 414; *Savage Manfg. Co. v. Armstrong*, 19 Me. 147.

¹⁸ Ante, § 428; *Hunt v. Livermore*, 5 Pick. 395; *Michigan Stove Co. v. Harris*, 81 Fed. Rep. 928.

¹ *Wolfe v. Hall*, 62 Ala. 24.

not calling for payment until the completion of the work or the service² even though it sets out a specified wage per day, month or year or per piece or item.³

Unless the contract provides for the place of payment, the debtor must seek the creditor. If the contract was made outside of the debtor's State, it is presumed that it is to be performed at the place where it is made. Where it is made in a State either with a person then a resident of the State, who afterwards removes therefrom, or with a non-resident of the State, it is the duty of the creditor to provide a place in the State where payments can be made, and it is not necessary for the debtor to go beyond the bounds of the State to make payment.⁴

A debtor is entitled to be satisfied of the authority of a person demanding payment before complying with the demand, and a refusal upon that specific ground is justifiable;⁵ but the possession of a signed receipt is sufficient evidence of the authority.⁶

If the payment is not made at the proper time, the creditor has a claim against the debtor for damages for the breach of the contract. These damages are, as a rule, merely "nominal," but they give the creditor a right of action. If the creditor, before commencing an action, accepts the amount of his debt in satisfaction, he cannot afterwards sue for the merely nominal damages for the detention. But it is otherwise when the payment is made after an action has been commenced.⁷ And payment of a less sum than

² *Stewart v. Newbury*, 220 N. Y. 379, 115 N. E. 984, and note 2 A. L. R. 522.

³ *Diefenback v. Stark*, 56 Wis. 462, 14 N. W. 621; *Carney v. Havens*, 23 Kas. 82; *Thayer v. Wadsworth*, 19 Pick. 349. Contra in some States: See *De Lappe v. Sullivan*, 7 Colo. 182, 2 Pac. 946; *Chicago Soap Co. v. Stansbury*, 99 Ill. App. 488.

⁴ *Weyand v. Park Terrace Co.*, 202 N. Y. 231.

⁵ *Nash v. Union Mut. Ins. Co.*, 43 Me. 343, 69 Am. Dec. 65.

⁶ *Nash v. Union Mut. Ins. Co.*, 43 Me. 343, 69 Am. Dec. 65.

⁷ *Lawson Rights, Rem. & Pr.* § 2535.

due, even though accepted by the creditor in full, is not, as we have seen, a discharge of the residue.⁸

§ 431. *Payment by Negotiable Instrument.*

Where payment is made in a bill or note, two different cases may arise. The creditor may take the security, and promise, in consideration of it, expressly or impliedly, to discharge the debtor altogether from his existing liabilities. He then relies upon his rights conferred by the instrument, and if it be dishonored at maturity must sue on it and cannot revert to his original cause of action.¹

Or the note may be accepted without that agreement. Here, as in the last case, the remedy on the original debt is suspended until the maturity of the note,² but, if the note is not then paid the original debt is revived³—provided the creditor has not been guilty of any laches or want of diligence in obtaining payment of the note.⁴

“Had A said to B ‘Here are two cashier’s checks, which I expect you to take as money, and if dishonored on presentation you must bear the loss’, it is not in the least probable that they would have been accepted. * * * He took the checks, as countless thousands of people in the world of business are taking them every day, not as money and not as absolute payment, but as an assurance that, upon making due demand

⁸ Ante, Chap. IV.

¹ Wolf v. Fink, 1 Pa. St. 435, 44 Am. Dec. 141; Ralston v. Wood, 15 Ill. 159, 58 Am. Dec. 604; Costar v. Davis, 8 Ark. 213, 46 Am. Dec. 311; Whitbeck v. Van Ness, 11 Johns. 409, 6 Am. Dec. 383.

² Glenn v. Smith, 2 Gill. & J. 493, 20 Am. Dec. 452; Happy v. Master, 48 N. Y. 313. The rule extends also to checks. Briggs v. Holmes, 118 Pa. St. 283, 4 Am. St. Rep. 597; Barnet v. Smith, 30 N. H. 256, 64 Am. Dec. 290. Also to “cashier’s checks,” Dille v. White, 132 Ia. 327.

³ Winstead Bk. v. Webb, 39 N. Y. 325, 100 Am. Dec. 435; Mudd v. Harper, 1 Md. 110, 54 Am. Dec. 644.

⁴ Cochran v. Wheeler, 7 N. H. 202, 26 Am. Dec. 732; Stevens v. Park, 73 Ill. 307; Phoenix Ins. Co. v. Allen, 11 Mich. 501.

at the place of deposit, payment would then and there be consummated.”⁵

The presumption is (nothing been shown to the contrary) that the parties intended the taking of the note to operate as a conditional discharge only;⁶ though, in a few States, a negotiable instrument received for an indebtedness is regarded as an absolute payment, unless a contrary intention is shown.⁷ Some cases draw a distinction between payment of a precedent indebtedness and a present one.⁸ In some States it is held that if the note be that of a third person, and not of the debtor, satisfaction is presumed.⁹ And it is generally held that satisfaction, and not merely conditional payment, is intended when the note of a third person is given without guaranty or indorsement, or is indorsed “without recourse” for a debt contracted at the time, as where a note of a third person is transferred by mere delivery or is indorsed without recourse for the price of goods sold at the time. Such a transaction is considered a barter or exchange of the note for the goods.¹⁰

The failure of a creditor to return a check sent to him by a creditor does not constitute a payment of the debt unless

⁵ *Dille v. White*, 132 Ia. 327.

⁶ *Nightengale v. Chaffee*, 12 R. I. 609, 23 Am. Rep. 531; *Folk v. Wilson*, 21 Md. 551, 83 Am. Dec. 599; re *Davis*, 5 Whart. 530, 34 Am. Dec. 574; *Moses v. Trice*, 21 Gratt. 556, 8 Am. Rep. 609; *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709; *Matteson v. Ellsworth*, 33 Wis. 502, 14 Am. Rep. 766; *Weymouth v. Sanborn*, 43 N. H. 171, 80 Am. Dec. 144; *Caldwell v. Hall*, 49 Ark. 568, 4 Am. St. Rep. 64.

⁷ This is the rule in Maine, Massachusetts, Indiana and Vermont. *Paine v. Dwinell*, 53 Me. 52; *Melledge v. Iron Co.*, 5 Cush. 158, 51 Am. Dec. 57; *Smith v. Bettgar*, 68 Ind. 254; *Hutchins v. Olcott*, 4 Vt. 549, 24 Am. Dec. 634.

⁸ *Hall v. Stevens*, 116 N. Y. 201.

⁹ *Wright v. Crockery Ware Co.*, 1 N. H. 281, 8 Am. Dec. 68; *Whitney v. Gow*, 20 N. H. 354; *Smith v. Bettgar*, 68 Ind. 254, 34 Am. Rep. 256; *Stafford v. Bacon*, 1 Hill 532, 37 Am. Dec. 366; *Gibson v. Tobey*, 46 N. Y. 637, 7 Am. Rep. 397.

¹⁰ *Benj. Prin. Contr.* 121, citing *Whitbeck v. Van Ness*, 11 Johns. 414, 6 Am. Dec. 167; *Breen v. Cook*, 11 Johns. 241; *Noel v. Murray* 13 N. Y. 167.

he has indicated in some way his intention to receive it as such.¹¹ The acceptor of a check, however, must present it for payment within a reasonable time and a failure to do so discharges the drawer who may have been damaged by such failure, as for instance where the bank subsequently fails.¹²

§ 432. *Payment in Forged or Worthless Notes or Counterfeit Coin.*

A payment knowingly or innocently made in worthless notes or in counterfeit bank bills or coin is no payment.¹ Nevertheless, in the case of an innocent payment, the law requires that after the detection of the counterfeit character of the money, whether coin or notes, there shall be no negligence or want of diligence on the part of the creditor who receives it in giving information to the payer of the true character of the money, and in returning it to him. For, if he is promptly notified he may be able to ascertain from whom he received it, and to trace it back from holder to holder till it shall be returned either to the original forger, or to him who passed it knowing it to be counterfeit.² Therefore where the creditor did not return the counterfeit money in one case until six months,³ in another until two months,⁴

¹¹ *Wheeler Co. v. Kitchen*, 169 Pac. 877 (Okla.); *Patten v. Lyatt*, 118 N. Y. Supp. 185.

¹² *Empire Copper Co. v. Shaw*, 181 Pac. 464 (Ariz.).

¹ *Markle v. Hatfield*, 2 Johns. 455, 3 Am. Dec. 446; *United States v. Morgan*, 11 How. 154; *Gilman v. Peck*, 11 Vt. 516, 34 Am. Dec. 702; *Watson v. Cresap*, 1 B. Mon. 195, 46 Am. Dec. 572; *Bank v. Buchanan*, 87 Tenn. 32, 10 Am. St. Rep. 617. So as to a check on an insolvent bank. *Hender v. Phoenix Loan Assn.*, 82 Mo. App. 427.

² *Simms v. Clark*, 11 Ill. 137; *Union Nat. Bank v. Baldenwick*, 45 Ill. 374; *Atwood v. Cornwall*, 28 Mich. 336, 15 Am. Rep. 219; *Lauranceburg National Bank v. Stevenson*, 51 Ind. 594.

³ *Raymond v. Baar*, 13 S. & R. 318, 15 Am. Dec. 603; *Rick v. Kelly*, 30 Pa. St. 530.

⁴ *Pindull v. Bank*, 7 Leigh, 617.

in another until ten days⁵ after he had received it, the court held that his delay estopped him from recovery against the debtor.

If a bill or note or check is invalid for any reason or worthless by reason of the insolvency of the maker, the creditor may repudiate the payment.⁶

The bills of an insolvent bank are no satisfaction of the debt, though at the time of payment neither party was aware that the bank had failed.⁷ But the loss falls upon the receiver, where the bank suspends payment immediately after payment.⁸ And a payment of a debt due a bank in its own depreciated bank notes is good.⁹

§ 433. *Sending Money by Post.*

To absolve a debtor who transmits money by mail to his creditor for the payment of his debt, from the hazard of loss in the transmission, it is necessary that the remittance shall be made by the authority, express or implied, of the creditor, and in the manner and with the precautions prescribed by him. The creditor may direct the debtor to send him money by mail, or it may have been the custom between them to do so, or the creditor may direct him to simply "remit" the amount or to send the money by a registered letter. In the

⁵ Thomas v. Todd, 6 Hill, 340.

⁶ Markle v. Hatfield, 2 Johns. 455, 3 Am. Dec. 446; Fleig v. Sleet, 43 Ohio St. 53, 54 Am. Rep. 800; Bank v. Smith, 5 Conn. 71, 13 Am. Dec. 37; Roberts v. Fisher, 43 N. Y. 159, 3 Am. Rep. 680; Hussey v. Sibley, 64 Me. 192, 22 Am. Rep. 557.

⁷ Fagg v. Sawyer, 9 N. H. 365; Wainwright v. Webster, 11 Vt. 576, 34 Am. Dec. 707; Gilman v. Peck, 11 Vt. 516, 34 Am. Dec. 702; Ontario Bk. v. Lightbody, 13 Wend. 101, 27 Am. Dec. 179; Westfall v. Braley, 10 Ohio St. 188, 75 Am. Dec. 509; Scruggs v. Gass, 8 Yerg. 175, 29 Am. Dec. 114; Frontier Bk. v. Morse, 22 Me. 88, 38 Am. Dec. 284. Contra: Bayard v. Skunk, 1 Watts & S. 92, 37 Am. Dec. 441; Edmunds v. Digges, 1 Gratt. 359, 42 Am. Dec. 561.

⁸ Ware v. Street, 2 Head, 609, 75 Am. Dec. 775.

⁹ Northampton Bank v. Balliet, 8 Watts & S. 311, 42 Am. Dec. 297; Blount v. Windley, 48 N. C. 1, 12 Am. Rep. 616.

first two cases if the debtor send the money by mail, and it is lost in transit he is discharged,¹ in the third he is not;² nor in the fourth if he fails to register the letter.³

§ 434. *Effect of Giving Receipt.*

A written receipt of payment is *prima facie* evidence of payment against the creditor but unless it be executed with the formalities of a deed it is not conclusive, and it is competent for him to contradict or explain it, and to show that the money was not paid.¹ The acknowledgment in a deed of the receipt of the consideration is only like any other written receipt *prima facie* evidence that the amount stated has been paid and may be rebutted by parol evidence.²

§ 435. *Appropriation of Payments.*

Where a debtor who owes several debts to the same creditor makes a partial payment to him, the question becomes material as to which of those several debts it has discharged, and as to the right of creditor and debtor respectively to appropriate the payment to a particular one of the debts. And three rules have been established by the courts for the settlement of such disputes, *viz.*:

1. The debtor, if there are several debts due from him, has

¹ Warwick v. Noakes, Peake, 67; Burr v. Sickles, 17 Ark. 428, 65 Am. Dec. 437; Gurney v. Howe, 9 Gray, 404, 69 Am. Dec. 299; Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58.

² Gross v. Criss, 3 Gratt. 262; Burr v. Sickles, 17 Ark. 428, 65 Am. Dec. 437. But see contra, Townsend v. Henry, 9 Rich. (L.) 318, where the direction was to "remit to us as soon as received."

³ Williams v. Carpenter, 36 Ala., 9, 76 Am. Dec. 317. And it makes no difference that the debtor was unable to register the letter.

¹ Tobey v. Barber, 5 Johns. 68, 4 Am. Dec. 326; Muldoon v. Whitlock, 1 Cow. 290 13 Am. Dec. 533; Real Estate Bk. v. Rawdon, 5 Ark. 558; State v. Giese, 36 Atl. 680 (N. J.).

² Jackson v. McChesney, 7 Cow. 360, 17 Am. Dec. 521; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Daniels v. Moses, 12 S. C. 130.

the first right to say to which of them his payment shall be applied.¹ And this right is so exclusive that the creditor is bound to apply the payment as he is directed even to a debt not due in preference to one overdue. The creditor may refuse it in such a case but if he accepts it he must apply it as directed.² And his intention appropriating a payment to a particular debt may be inferred from circumstances, when not declared in express terms by the debtor.³ Where a person pays the exact amount of one of two debts which he owes, it is presumed that he intended to appropriate the payment to that debt and not to the other one, be it larger or smaller.⁴

2. The creditor, if the payment is made without any directions express or implied, has the right to appropriate it to any debt due to him from the debtor,⁵ provided he exercises his right within a reasonable time.⁶ But once he has made his election, and communicated it either expressly or by implication to the debtor, he will not be allowed to change it according to his interest or convenience.⁷ The creditor's right does not extend to a payment received from a third

¹ Mann v. Marsh, 2 Caines, 99; Patty v. Milne, 16 Wend. 557, 22 Wend. 558; Vicary v. Moore, 2 Watts, 451, 27 Am. Dec. 323; Pickering v. Day, 3 Houst, 474, 95 Am. Dec. 291; Washington, etc., Gas. Co. v. Johnson, 123 Pa. St. 526, 10 Am. St. Rep. 553.

² Wetherell v. Joy, 40 Me. 325; Croft v. Lumley, 5 El. & Bl. 680.

³ Stewart v. Keith, 12 Pa. St. 238; Stone v. Seymour, 15 Wend. 19.

⁴ Seymour v. Van Slyk, 8 Wend. 403; Marryatts v. White, 2 Stark. 102.

⁵ Brady v. Hill, 1 Mo. 315, 13 Am. Dec. 503; Van Rensselaer v. Roberts, 5 Denio, 470; Waterman v. Younger, 49 Mo. 413; Byrnes v. Claffey, 69 Cal. 120.

⁶ Harker v. Conrad, 12 S. & R. 301, 14 Am. Dec. 691; Stone v. Seymour, 39 Mo. (App.) 165; Grasser Co. v. Rogers, 70 N. W. Rep 445 (Mich.). It is said that he may make the appropriation at any time while the position of the parties remains unaltered. Leake Contr. 920. But certainly he could not make the appropriation after suit brought. Haynes v. Waite, 14 Cal. 446; Pickering v. Day, 3 Houst, 474, 95 Am. Dec. 291.

⁷ Hill v. Southerland, 1 Wash. 128; Bank v. Meredith, 2 Wash. 47.

party on account of the debtor and without his knowledge;⁸ nor has a third person any right to insist on a particular application of a payment.⁹

The civil law rule which requires the creditor to consult the debtor's interest in preference to his own has not been adopted in our courts.¹⁰ He may appropriate the payment to a claim which he could not recover by action,¹¹ or a debt barred by the statute of limitations,¹² or unenforceable under the statute of frauds;¹³ or to a debt unguaranteed in preference to one for which he holds security, or has a superior remedy;¹⁴ or to a purely equitable debt in preference to a legal debt.¹⁵ But he cannot appropriate it to an illegal and invalid claim;¹⁶ or to a claim arising out of a transaction forbidden by statute;¹⁷ or on a debt or liability not yet due;¹⁸ or to a debt in a representative capacity in preference to a personal debt.¹⁹

3. Where neither party has made the appropriation the rule of the common law was that the law would appropriate the

⁸ Leake Contr. 920.

⁹ Gordon v. Hobart, 2 Story, 423; Blackmore v. Granberry, 39 S. W. Rep. 229 (Tenn.).

¹⁰ Logan v. Mason, 6 W. & S. 9.

¹¹ Arnold v. Mayor, 4 Man. & G. 600; James v. Child, 2 Crompt. & J. 678; McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781; Sellick v. Munson, 2 Aik. 150, 16 Am. Dec. 689.

¹² Ayer v. Hawkins, 19 Vt. 26.

¹³ Haynes v. Nice, 100 Mass. 327, 1 Am. Rep. 109; Murphy v. Webster, 61 Me. 478.

¹⁴ Peters v. Anderson, 5 Taunt, 596; Kirby v. Marlborough, 2 Maule & S. 18; Mathews v. Snitzler, 46 Mo. 301; Wood v. Callaghan, 61 Mich. 402, 1 Am. St. Rep. 597.

¹⁵ Kidder v. Norris, 18 N. H. 534; Bohe v. Stickney, 36 Ala. 495.

¹⁶ Phillips v. Moses, 65 Me. 70; Pickett v. Bank, 32 Ark. 346; McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781.

¹⁷ Phillips v. Moses, 65 Me. 70.

¹⁸ Heard v. Pulaski, 80 Ala. 502.

¹⁹ Fowke v. Bowie, 4 Har. & J. 566; Sawyer v. Tappan, 14 N. H. 352; Sneed v. Webster, 2 A. K. March. 277.

payment to the oldest debt²⁰—another illustration of its natural antipathy to any civil law rule which was to appropriate the payment to the debt most burdensome to the debtor. But this more equitable rule has found favor in many of the courts to the extent of holding that the appropriation will be made by no fixed rule, but that the law will appropriate the payment according to the justice of the particular case;²¹ that it will apply the payment, for example, to the debt whose security is most precarious;²² to a secured in preference to a simple debt;²³ to a certain in preference to a contingent liability;²⁴ to a debt enforceable by law in preference to one not so enforceable.²⁵

(c)

TENDER.

§ 436. *Tender When a Discharge.*

An attempted performance which is frustrated by the act of the party to whom the performance is due is called tender. The word is applied to an offer of performance of a promise to *do something*, and to an offer of performance of a promise

²⁰ Stone v. Seymour, 15 Wend. 19; Sprague v. Hazennubel, 53 Ill. 419; Crompton v. Pratt, 105 Mass. 255; Langdon v. Bowen, 46 Vt. 512; Miller v. Miller, 23 Me. 22, 39 Am. Dec. 597; Parks v. Ingram, 22 N. H. 283, 55 Am. Dec. 153; Hersey v. Bennett, 28 Minn. 86, 41 Am. Rep. 271; Willis v. McIntyre, 70 Tex. 34, 8 Am. St. Rep. 574.

²¹ White v. Trumbull, 15 N. J. (L.) 314, 29 Am. Dec. 657; Smith v. Lloyd, 11 Leigh. 512; Am. Dec. 671; The Martha, 29 Fed. Rep. 708.

²² Field v. Holland, 6 Cranch, 8; Stamford Bank v. Benedict, 15 Conn. 437; Goetz v. Piel, 6 Mo. App. 634.

²³ Patterson v. Hall, 9 Cow. 747; Robinson v. Doolittle, 12 Vt. 246; Callagan v. Boozman, 21 Ala. 246; Jones v. Benedict, 83 N. Y. 79; Stamford Bank v. Benedict, 15 Conn. 438. But see Lanier v. Wyman, 5 Rob. (N. Y.) 160; Burks v. Albert, 4 J. J. Marsh, 97, 20 Am. Dec. 209; Putnam v. Russell, 17 Vt. 54, 42 Am. Dec. 478.

²⁴ Bank v. Rosevelt, 9 Cow. 409; Bank v. Brown, 22 Me. 294; Newman v. Meek, 1 Smedes & M. 331.

²⁵ Backman v. Wright, 27 Vt. 187, 65 Am. Dec. 187; Hall v. Clement, 41 N. H. 169.

to *pay something*; and a distinction in its effect in the two cases must not be overlooked.

In the first case where a promisor makes a proper offer of performance to the promisee and the offer is not accepted, the promisor is thereby discharged from liability on his promise. Thus in a contract for the sale of goods if the vendor satisfies all the requirements of the contract as to delivery, and the purchaser nevertheless refuses to accept the goods, the vendor is discharged by such a tender of performance, and may either maintain or defend successfully an action for the breach of the contract.¹ The tender of them passes the title and vests the property in the other party,² and the promisor holds them thereafter as his bailee.³

The effect of a valid tender is not to extinguish the debt, for it is an admission of the contract. What it does is to put the plaintiff in the wrong and to show that the defendant is ready and willing to discharge his debt. Accordingly, a valid tender stops the further accrual of interest,⁴ and extinguishes the right of lien.⁵

If the creditor will not take the money due to him when he has a right to demand it, and brings an action for it, the debtor must, in order to defend himself successfully by a plea of tender, continue always ready and willing to pay the debt.⁶ Then when he is sued upon it, he can plead that

¹ Mitchell v. Merrill, 2 Blackf. 87, 18 Am. Dec. 128; Lamb v. Lathrop, 13 Wend. 75, 27 Am. Dec. 174.

² Barney v. Bliss, 1 D. Chip. 399, 12 Am. Dec. 697; Lamb v. Lathrop, 13 Wend. 95, 27 Am. Dec. 174.

³ Colt v. Houston, 3 Johns. Cas. 243; Brooklyn Bank v. DeGrauw, 23 Wend. 342, 35 Am. Dec. 569; Lamb v. Lathrop, 13 Wend. 95, 27 Am. Dec. 174; Rottman v. Hevener (Col.), 202 P. 329.

⁴ Dent v. Dunn, 3 Camp. 296.

⁵ Ratcliff v. Davies, Cro. Jac. 244; Chilton v. Carrington, 24 L. J. C. P. 10; 16 C. B. 206.

⁶ Pulsifer v. Shepherd, 36 Ill. 512; Mason v. Groom, 24 Ga. 211; Cary v. Bancroft, 14 Pick. 315, 25 Am. Dec. 393; Lanier v. Trigg, 6 S. & M. 641, 45 Am. Dec. 293. By a subsequent demand and refusal, the benefit of the tender is lost. Rose v. Brown, Kirby 293, 1 Am. Dec. 22; Manny v. Harris, 2 Johns. 24, 3 Am. Dec. 389. But though

he tendered, but he must also pay the money into court, and if he proves his plea, the plaintiff gets nothing but the money which was originally tendered him, and the defendant gets judgment for his costs of defense.⁷ If the debtor fails to keep his tender good by deposit, the plaintiff recovers the amount of the tender without interest from the date of tender, but with costs of suit.⁸ Payment into court is a transfer of the money to the creditor. If it be lost or stolen, the loss falls on the creditor.⁹ A tender and payment into court of part of the debt will not stop the costs.¹⁰

§ 437. *Requisites of Valid Tender.*

A tender to be a valid performance to the extent just stated must be made by the debtor, his agent or one professing to act in his behalf,¹ and to the creditor or one authorized to receive it,² and it must also observe exactly any special

the debtor must keep the money safely, so as to be ready at any time to produce it, *Call v. Scott*, 4 Call. 402; *Stow v. Russell*, 36 Ill. 18; he may use it. *Curtiss v. Greenbanks*, 24 Vt. 536. But see *Roosevelt v. Bank*, 45 Barb. 579; *Gray v. Angier*, 62 Ga. 596. And he need not have the identical money ready. *Colby v. Stevens*, 38 N. H. 191; *Michigan, etc., R. R. Co. v. Dunham*, 30 Mich. 128.

⁷ *Aulger v. Clay*, 109 Ill. 487; *Bissell v. Heyward*, 96 U. S. 580; *Brooklyn Bank v. DeGrauw*, 23 Wend. 342, 35 Am. Dec. 569; *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346; *Raymond v. McKinney*, 58 Mo. (App.) 303. A tender after suit stops the running of interest on the debt. *Raymond v. Bearnard*, 12 Johns. 274, 7 Am. Dec. 317; *Woodruff v. Trapnell*, 12 Ark. 646. And bars the recovery of costs accruing subsequently. *Hills v. Place*, 7 Rob. (N. Y.) 289, 48 N. Y. 520; *Murray v. Windly*, 7 Ired. 201, 47 Am. Dec. 324. But it does not bar the action or extinguish the debt. *Hills v. Place*, *supra*; *Spann v. Beltzell*, 1 Fla. 301, 46 Am. Dec. 347.

⁸ *Raymond v. McKinney*, 58 Mo. (App.) 303.

⁹ *Mann v. Sprout*, 185 N. Y. 109.

¹⁰ *Emerson v. Kinne*, 68 N. W. Rep. 982 (Mich.).

¹ *Brown v. Dysinger*, 1 Rawle, 508; *Kincaid v. School Dist.*, 11 Me. 188; *Mahler v. Newbaur*, 32 Cal. 168, 91 Am. Dec. 571.

² *King v. Finch*, 60 Ind. 420; *Jackson v. Crafts*, 18 Johns. 110; *McNiffe v. Wheelock*, 1 Gray, 600; *Oatman v. Walker*, 33 Me. 67; *Conrad v. Druids Grove*, 64 Wis. 258; *Taylor v. Hemphill (Tex.)*, 238 S. W. 986.

terms which the contract may contain as to time, place, and mode of payment.³ It must be of the whole debt, though if there be a number of distinct items, the debtor may make a good tender of payment of one of them, provided he specifies the one he wishes to discharge.⁴ And the following are other legal requisites to a valid tender:

1. It must be made in that currency which the law makes a legal tender in payment of debts. In the United States legal tender consists of the gold and silver coin of the country, the smaller coins, in small sums, and the United States treasury notes.⁵

2. It must be in the exact amount of the debt;⁶ a tender of a larger sum than is due with a request for change is not a good tender; if the creditor refuses to give change and demands the exact amount.⁷

And it is immaterial that the debtor does not know the exact amount or believes the sum offered sufficient.⁸

3. It must be made in such a manner that the party entitled may have an opportunity of understanding the object of the

³ Lawson Rights, Rem., & Pr., § 2530.

⁴ Strong v. Harvey, 3 Bing. 304.

⁵ Knox v. Lee, 12 Wall. 457. A mutilated bank note is not a good tender. North Hudson R. Co. v. Anderson, 39 Atl. Rep. 905 (N. J.). But so long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value. Jersey City R. Co. v. Morgan, 160 U. S. 288. A genuine silver coin of the United States, distinguishable as such, though somewhat rare, and differing in appearance from other coins of the government, of like denomination and of later dates, is nevertheless a legal tender. Atlanta R. Co. v. Keeny, 25 S. E. Rep. 629 (Ga.).

⁶ Brandt v. R. Co., 26 Ia. 114; Fridge v. State, 3 G. & J. 103, 20 Am. Dec. 463.

⁷ Betterbee v. Davis, 3 Camp. 70; Robinson v. Cook, 6 Taunt. 336. A street car company, it has been held in California by custom, must accept a larger coin than five cents and furnish change. Barrett v. Market St. Co., 81 Cal. 296, 15 A. S. R. 61. Contra Barker v. R. Co., 151 N. Y. 237, 35 L. R. A. 489 Note.

⁸ Brandt v. R. Co., 26 Ia. 114; Lilienthal v. McCormack, 117 Fed. 89; Graves v. Burch, 181 Pac. 354 and note in 5 A. L. R. 1226.

tender, and seeing that what is presented for his acceptance is really what he stipulated to have.⁹ Therefore in the case of money it must be actually produced,¹⁰ so that the party can see it.¹¹ "It is not a legal tender to say, 'Here, I am ready;' the debtor must have the money ready also."¹² The reason it is said why the law attaches so much importance to the production of the money is that "the sight of it may tempt the creditor to yield."¹³ In the case of a delivery of goods, they must be so tendered as to give time and opportunity to the creditor to examine and accept them.¹⁴ Therefore a tender of goods is not properly made by an offer to deliver closed casks, said to contain the goods, but the contents of which are not allowed to be seen and examined.¹⁵

4. It must be made unconditionally,¹⁶ for if it be accompanied by a demand for a receipt, or that the creditor shall admit that this is all that is due, or that the money shall be received in full of all demands, it is not a valid tender.¹⁷ In the case of a non-commercial promissory note, the authorities are in conflict as to whether a good tender can be made upon the condition that the note shall be surrendered, but in

⁹ *Potts v. Plaisted*, 30 Mich. 149.

¹⁰ *Ladd v. Patton*, 1 Cranch. C. C. 263; *Camp v. Simon*, 34 Ala. 126; *Englander v. Rogers*, 41 Cal. 420; *Bakeman v. Pooler*, 15 Wend. 637; *Sargent v. Graham*, 5 N. H. 440, 22 Am. Dec. 469.

¹¹ *Knight v. Abbott*, 30 Vt. 577; *Behaly v. Hatch*, 1 Miss. 369, 12 Am. Dec. 570; *Jewett v. Earle*, 53 N. Y. S. C. 349.

¹² *Murphy v. Guion*, 3 Hayd. (N. C.) 162, 2 Am. Dec. 623; *Brown v. Holley*, 38 Vt. 574.

¹³ *Shirley Lead. Cas.* 398.

¹⁴ *Isherwood v. Whitmore*, 10 M. & W. 757; *Bates v. Bates*, 1 Miss. 401, 12 Am. Dec. 572; *Wyman v. Winslow*, 11 Me. 398, 26 Am. Dec. 542; *Hawley v. Mason*, 9 Dana, 32, 33 Am. Dec. 522.

¹⁵ *Isherwood v. Whitmore*, *supra*.

¹⁶ *Smith v. Keels*, 15 Rich. 318; *Brooklyn Bk. v. DeGrauw*, 23 Wend. 344, 35 Am. Dec. 569; *Rives v. Dudley*, 3 Jones (Eq.) 126, 67 Am. Dec. 231.

¹⁷ *Thayer v. Brockett*, 12 Mass. 450; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 148; *Draper v. Hitt*, 43 Vt. 439, 5 Am. Rep. 292; *Holton v. Brown*, 18 Vt. 224, 46 Am. Dec. 149; *Brown v. Gilmore*, 8 Me. 107, 22 Am. Dec. 223.

the case of commercial paper the authorities seem to be uniform that a tender upon condition that the paper shall be surrendered is good, because such paper might be put in circulation after payment and innocent parties become liable, which is not so with non-commercial paper; after payment by the maker it becomes harmless as against him, wherever it may go.¹⁸ A tender, however, may be made under protest;¹⁹ and an acceptance by the creditor of a tender made on condition is an acceptance of the condition.²⁰

5. It must be maintained and kept open. In the case of chattels as long as the person making the tender continues in possession of the goods, and insists that they are the property of the buyer and refuses to treat the contract of sale as rescinded, he will be bound to deliver them on demand. And in the case of money not only must he keep the money ready, but as we have seen he must if sued pay it into court.

6. Defects in the tender from any of the causes above may be waived by the creditor dispensing with it²¹ or refusing to receive the thing tendered on some other ground than that which he afterwards sets up as a defect in the tender.²² Thus a tender in what is not a legal tender—as for example a check or money not good under the law—is valid where the creditor objects to the amount, and not to the quality, of the

Story v. Krewson, 55 Ind. 397, 23 Am. Rep. 668; Strafford v. Welch, 59 N. H. 46.

¹⁸ Scott v. R. R. Co., L. R. 1 C. P. 596.

²⁰ Lee v. Dodd, 20 Mo. (App.) 271; Fulton v. Kemp, 33 N. E. Rep. 1034; Anderson v. Bank (Mo.), 234 S. W. 518.

²¹ As where a debtor called on his creditor and said he had 8l. 18s. 3d. in his pocket to pay the debt with, whereupon the creditor exclaimed, "*You needn't give yourself the trouble of offering it, for I'm not going to take it.*" Douglas v. Patrick, 3 T. R. 638. There was not a sufficient tender where the production of the money was prevented by the creditor leaving the room after the debtor had offered to pay it, and whilst he was in the act of taking it from his pocket. Leatherdale v. Sweepstone, 3 C. & P. 342.

²² Whelan v. Reilly, 61 Mo. 565; Gould v. Banks, 8 Wend. 562, 24 Am. Dec. 70.

tender.²³ So where the money was not produced, but the creditor objected that the amount was not sufficient;²⁴ and where a receipt was demanded, but the creditor objected that a greater amount was due.²⁵

In a leading English case B's agent called on his creditor, F, and said: "I am come, Mr. F, to pay you the money which Mr. B owes you," whereupon he put his hand into his pocket to get the coin. F, however, replied, "I can't take it, the matter is now in the hands of my attorney," and so the lawyer took his hand out of his pocket again without producing the money. It was held that it did *not* constitute a valid tender, for there was *neither production of the money nor dispensation with production*.²⁶

§ 438. *When Tender Not Necessary.*

A tender is not necessary where the creditor either expressly or impliedly waives it;¹ as where he states that nothing is due him, and that he will accept nothing;² or says simply that he will not receive the money or chattels;³ or absents himself from home, or avoids the debtor, in order that a tender shall not be made to him;⁴ or expressly refuses to perform his part of the contract.⁵

²³ Polglass v. Oliver, 2 Crompt. & J. 15; Jones v. Arthur, 8 Dowl. 442; Ball v. Stanley, 5 Yerg. 199, 26 Am. Dec. 263; Raymond v. McKinney, 58 Mo. (App.) 303.

²⁴ Polglass v. Oliver, 2 Crompt. & J. 16; Thorne v. Mosher, 20 N. J. (Eq.) 257.

²⁵ Richardson v. Jackson, 8 Mees. & W. 298.

²⁶ Finch v. Brook, 1 Bing. N. C. 283; 2 Scott. 511.

¹ Holmes v. Holmes, 12 Barb. 137, 9 N. Y. 525; Thorne v. Mosher, 20 N. J. (Eq.) 553; Haskell v. Brewer, 11 Me. 285.

² Lacy v. Wilson, 24 Mich. 479; Sharp v. Todd, 38 N. J. (Eq.) 324.

³ Bellinger v. Kilts, 6 Barb. 273; Brewer v. Fleming, 51 Pa. St. 102; Terrell v. Walker, 65 N. C. 91; Dorsey v. Barbee, Litt. Sel. Cas. 204, 12 Am. Dec. 296.

⁴ Southworth v. Smith, 7 Cush. 391; Noyes v. Clark, 7 Paige, 179, 32 Am. Dec. 620; Comstock v. Lager, 78 Mo. (App.) 390.

⁵ Skinner v. Tinker, 34 Barb. 333; Newcomb v. Brackett, 16 Mass. 161; Post v. Garrow, 18 Neb. 682.

CHAPTER XIV.

DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.

SECTION 439. Introductory.

440. One Must Perform What He Promises.

441. Obligation Imposed by Law and by Contract Distinguished.

442. Impossibility of Performance no Excuse.

442a. Through Act of Third Person.

443. Exceptions to this Rule.

444. Same—First Exception.

445. Same—Second Exception.

445a. Contract Not Invalid.

446. Alternative Promises.

§ 439. *Introductory.*

Impossibility of Performance may take place from the fact that there was not at the time the contract was made any way of carrying it out or from the fact that subsequent to the making of the contract circumstances have arisen which make it impossible to perform it. These cases have already been touched upon. They are: (a) impossibility on the very face of the agreement or known to both parties at the time, which avoids the contract because there is no real consideration,¹ and (b) impossibility at the time of the contract not known to either party, which may avoid the contract on the ground of mistake.²

[There is one other kind of impossibility at the time, *i. e.*, where the impossibility is known to one party but not to the other. Where the impossibility is known only to the promisor,

¹ Ante, Chap. IV.

² Ante, Chap. VI.

he is taken to intend to bind himself absolutely.³ Where the impossibility is known only to the promisee, it cannot be accepted with the expectation that it will be carried out and therefore the promise is not binding.⁴

What is to be dealt with here is impossibility arising subsequent to the formation of the contract.

§ 440. *One Must Perform What He Promises.*

The common law practically says to parties who are entering into contracts, "Don't promise what you can't perform." A man is not obliged to undertake to do a dangerous or a burdensome or an unreasonable thing, but if he

³ A covenant to pay a sum of money "when I collect the money on a bond on which suit is pending," is broken if there is no such bond or suit pending. *Bullock v. Pottinger*, 3 J. J. Marsh. 74, 19 Am. Dec. 164. A married man promised to marry a woman who was then unaware of his being married. It was held, that he was absolutely bound by his promise. *Wild v. Harris*, 7 Com. B. 999; *Milward v. Littlewood*, 5 Ex. 775. "The promise to marry," said the court, "implies on his part that he is then capable of marrying, and he has broken that promise at the time of making it." *Cover v. Davenport*, 1 Heisk. 368, 2 Am. Rep. 706; *Kelly v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; and see *Pollock v. Sullivan*, 53 Vt. 507, 38 Am. Rep. 702. So where by a charter-party the freighter undertook to load "with the usual dispatch of the port," which he knew he was then incapable of doing by reason of his previous engagements with other vessels that had precedence by the rules of the port, it was held that he was absolutely bound by his contract to load and responsible for the delay. *Ashcroft v. Colliery Co.*, L. R. 9 Q. B. 540. Where a subsequent impossibility of performance might have been foreseen by the promisor and he chooses to bind himself absolutely he cannot plead it as a defense. *Jennings v. Lyon*, 39 Wis. 553, 20 Am. Rep. 57; *Bryan v. Spurgin*, 5 Sneed. 681.

⁴ *Leake Contr.* 692. "An architect when employed to draw plans and specifications for a building, of a given style and dimensions, may recover for the reasonable value of his services, even though the building planned be one that the employer cannot erect, at the place where it is his purpose to erect it. But the rule is otherwise where the lot or the location of the lot on which the building is intended to be erected is made known to him. In such a case he is bound to know the building restrictions of the particular place and draw the plans and specifications accordingly, else forfeit his right of recovery for such services." *Bebb v. Jordan*, 189 Pac. 553, (Wash.)

does so he must carry out his agreement.¹ If he wishes to protect himself from the thing which he agrees to do, turning out to be difficult or dangerous or unreasonable, he has full opportunity to so provide in his contract, and if he promises unconditionally he will be bound unconditionally.²

A person who sells goods agreeing to deliver them at a certain time, cannot plead that contrary to his expectations he could not get the goods when or at the price he intended³ nor that on account of disturbances in the country it would be dangerous to try to deliver them.⁴ Where one agrees to unload a cargo within a given time, he was not excused because of a strike of dockers⁵ or because of storms.⁶ So, one who agrees to do certain work cannot set up that on account of matters connected with it which he did not expect, it has

¹ "A person may undertake by agreement to do any particular act, and if it is not reasonable, it is his own fault for entering into such a contract." *Vyse v. Wakefield*, 6 M. & W. 456. Where to an action for breach of promise to marry, the defendant pleaded that after making the promise he became afflicted with a disease which rendered him incapable of marriage without danger of his life, this was held no defense. *Hall v. Wright*, El B. & E. 765. Contra see *Trammell v. Vaughan*, 158 Mo. 214.

² *Dewey v. Alpena School Dist.*, 43 Mich. 480, 38 Am. Rep. 206; *Superintendent v. Bennett*, 27 N. J. (L.) 513, 72 Am. Dec. 373; *McDonald v. Gardner*, 56 Wis. 35; *Dermott v. Jones*, 2 Wall. 1; *Janes v. Scott*, 59 Pa. St. 178, 98 Am. Dec. 129; *Myers v. Diamond Joe Line*, 58 Mo. (App.) 201; *Robson v. Mississippi River Co.*, 61 Fed. Rep. 900; *Jones v. Anderson*, 82 Ala. 302, 2 South. Rep. 911; *Tobias v. Lisberger*, 105 N. Y. 404, 12 N. E. 13, 59 Am. Rep. 809; *U. S. v. Smoot*, 15 Wall. 36; *Smith v. Compton*, 52 Atl. 386 (N. J.); *Hanthorn v. Quinn*, 69 Pac. Rep. 817 (Or.). *Columbus Light Co. v. Columbus*, 249 U. S. 399. *Carnegie Steel Co. v. U. S.*, 240 U. S. 156. *Rowe v. Peabody*, 207 Mass. 226.

³ *Phillips v. Taylor*, 49 N. Y. Sup. Ct. 318; *Gilpins v. Consequa*, Pet. C. C. 85, 3 Wash. 184; *Youqua v. Nixon*, Pet. C. C. 221.

⁴ *Elsev v. Stamps*, 10 Lea, 709.

⁵ *Budgett v. Binnington*, 1 Q. B. 35 1891. See *Empire Trans. Co. v. Phila. Co.*, 77 Fed. 919; *Geismen v. Lake Shore Co.*, 102 N. Y. 563; *Walsh v. Fisher*, 102 Wis. 172.

⁶ *Thiis v. Byers*, 1 Q. B. D. 244 (1876).

become difficult or will be impossible to carry it on.⁷ Where a school teacher was engaged for a certain term and the directors before the end of the term closed the school on account of smallpox in the neighborhood, that it was eminently dangerous to continue the school was no answer to the teacher's suit for the remainder of his salary.⁸ Where plaintiff agreed to furnish a certain number of horses to the government, and before the time they were deliverable, the bureau of cavalry, as it had a right to do, adopted new regulations in regard to the inspection and acceptance of horses which plaintiff claimed made it impossible for him to obtain horses and he abandoned his contract, this was held no justification.⁹ It is not an excuse for not carrying out an agreement to grind sugar corn during the season that the machinery unexpectedly and repeatedly broke down.¹⁰ An impossibility of performance due to a foreign war is no excuse.¹¹

⁷ *Devlin v. New York*, 4 Duer. 337; *Sheman v. Mayor*, 1 N. Y. 316; *Janes v. Scott*, *supra*. *Leavitt v. Dover*, 32 Atl. Rep. 156 (N. H.); *Anderson v. May*, 50 Minn. 280; *Cowley v. Davidson*, 13 Minn. 92; *McQuiddy v. Brannock*, 70 Mo. (App.) 543; *Cochran v. R. Co.*, 131 Mo. 607; *Nickel v. Fitch*, 46 Cent. L. J. 28 (Mich.).

⁸ *Dewey v. School Dist.*, *supra*; *Gear v. Gray*, 37 N. W. Rep. 1059 (Ind.).

⁹ *In re Smoot*, 15 Wall. 36.

¹⁰ *Porto Rico Sugar Co. v. Lorenzo*, 222 U. S. 481.

¹¹ *Tweedie Trading Co. v. McDonald Co.*, 114 Fed. 985; *Ducas Co. v. Bayer Co.*, 163 N. Y. S. 32; *Richards v. Wreschner*, 156 Id. 1054, 158 Id. 1129. On July 31, 1914, the master of a German passenger ship, in the middle of the ocean voyaging from New York to England, received a wireless message "Turn back to New York. War has broken out with England, France, Russia." This was not true, as war with Russia was not declared until the next day and with France and England until several days later. The master obeyed the order and at once returned to New York. In a suit for damages for nondelivery of cargo it was held that the risk of danger was not an excuse for nonperformance, as he might have discharged his cargo in England and reached his home port before war was actually declared between Germany, France and England. *The Kronprinzessin Cecilie*, 238 Fed. 668, reversed by a divided court, 37 S. C. Rep. 490. And see *North. Pac. R. Co. v. Am. Trading Co.*, 195 U. S. 439.

§ 441. *Obligation Imposed by Law and by Contract Distinguished.*

An obligation imposed by law is always reasonable, and when the law creates a duty or charge and the party is disabled from performing it without any fault in him, the law will excuse him. Thus in the case of waste (which is a damage to land or tenements while in the possession of a tenant for life or years for which he is held liable to the reversioner independent of any contract) if a house or buildings or trees be destroyed by the act of God as by storms or tempest or by rioters or public enemies, the tenant is excused.¹ So in the case of a common carrier whom the law charges as an insurer of the property he undertakes to carry, he is excused for losses arising from the act of God or the public enemy.² The reason here is that the extraordinary responsibility is imposed on him without his consent.³

But if a man expressly agrees to pay rent for premises for a certain term, and before that time, they are destroyed by the act of God or other causes beyond his control he is not discharged.⁴ "If the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."⁵ Where A leased a spring for a term agreeing to pay rent for that term in order to obtain pure water, he was held not discharged from paying rent because the water subsequently became polluted and useless

¹ White v. Wagner, 4 H. & J. 373, 7 Am. Dec. 674.

² Lawson Bail., Chap. XI.

³ Davis v. Smith, 15 Mo. 469.

⁴ Hallett v. Wylie, 3 Johns. 44, 3 Am. Dec. 457; Linn v. Ross, 10 Ohio 412, 36 Am. Dec. 95; Laughner v. Glenn, 37 Minn. 4; Davis v. Smith, supra; Burnet v. Fuchs, 28 Mo. (App.) 279; O'Neil v. Flannagan, 64 Mo. (App.) 88. This rule, it must be noted, has been modified or abolished by statute in some States. 1 Stim. Am. St. L. 2062.

⁵ Ross v. Overton, 3 Call. 309, 2 Am. Dec. 552; Abby v. Billups, 35 Miss. 618, 72 Am. Dec. 143; Hoy v. Holt, 91 Pa. St. 88; 36 Am. Rep. 659; Scott v. Scott, 18 Gratt. 166.

to him.⁶ If a common carrier, instead of undertaking the service under his common law liability, should specially agree to carry safely, he would be bound for a loss which might happen from a cause which without any contract would have excused him.⁷ The reason here is that if he did not wish to be liable for these things he might have provided against them in his contract. The law never creates or imposes upon any one a duty to perform what may become impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law.⁸

§ 442. *Impossibility of Performance No Excuse.*

Therefore if the promisor makes the performance of his promise conditional upon its continued possibility, the promisee takes the risk, and in the event of performance becoming impossible, the promisee must bear the loss. But if the promisor makes his promise unconditionally, he takes the risk of being held liable, even though performance should become unexpectedly burdensome and different or even impossible by circumstances beyond his control.¹

⁶ Jones v. Waterworks Co., 65 Mo. (App.) 388.

⁷ Gaither v. Barnet, 2 Brev. 488. Where a common carrier contracted to deliver certain packages in good order and condition "unavoidable accidents only excepted," he was held liable for a loss by the public enemy. Fish v. Chapman, 2 Ga. 349.

⁸ School Dist. v. Dauchy, 25 Conn. 530, 68 Am. Dec. 371.

¹ The Harriman, 9 Wall. 172; Jones v. U. S., 96 U. S. 29; Dermott v. Jones, 2 Wall. 1; Bunnby v. Smith, 3 Ala. (N. S.) 123; Stephens v. Vaughan, 4 J. J. Marsh, 206, 20 Am. Dec. 216; Singleton v. Carroll, 6 J. J. Marsh, 527, 22 Am. Dec. 95; Wells v. Calnan, 107 Mass. 517, 9 Am. Rep. 65; Dist. Township v. Smith, 39 Iowa 11, 18 Am. Rep. 39; Bacon v. Cobb, 45 Ill. 53; Schwartz v. Saunders, 46 Ill. 22; Cassidy v. Clark, 7 Ark. 131; Graves v. Berdau, 29 Barb. 101; Cobb v. Harmon, 29 Barb. 476; Kein v. Tupper, 43 How. Pr. 451; Van Buskirk v. Roberts, 31 N. Y. 675; Bebee v. Johnson, 19 Wend. 500; Drake v. White, 177 Mass. 10; School Trustees v. Bennett, 27 N. J. (L.) 513, 72 Am. Dec. 373; Booth v. Rolling Mill Co., 60 N. Y. 487; Worthington v. Ins. Co., 41 Conn. 401, 19 Am. Rep. 495; Tompkins v. Dudley, 25 N. Y. 272, 82 Am. Dec. 349; Stees v. Leonard.

In *School District v. Dauchy*,² defendant agreed to build and complete a schoolhouse for plaintiff. When nearly completed, the building was struck by lightning and destroyed. The court held that the destruction of the building did not excuse defendant's non-performance of the contract.³ So, where one had agreed to transport goods from New York to Independence, Missouri, within twenty-six days, and failed to accomplish it in that time, it was held that the fact that a public canal on which the goods were intended to be transported a part of the distance was rendered impassable by an unusual freshet, and that this occasioned the detention, was not a legal excuse.⁴ A water company agreed to supply water to a consumer with pressure sufficient for fire purposes. It is liable for damages sustained in consequence of a failure in the water pressure, though the failure is due to a break in its pipes without the company's fault.⁵ Where A, residing in Kansas agreed with B, in Texas, that he would furnish 1,000 cattle belonging to B, plenty of good grass, salt and water during the next season, the act of God—an unprecedented drought did not discharge him.⁶

§ 442a. *Through Act of Third Person.*

The inability to control the action of a third person which is necessary for the performance is no excuse. Where on

20 Minn. 494; *Boyle v. Agawam Canal Co.*, 22 Pick. 381, 33 Am. Dec. 749; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *Harrison v. Mo. Pac. R. Co.*, 74 Mo. 371; *Beatie v. Coal Co.*, 56 Mo. (App.) 221; *Knappman v. Water Co.*, 45 Atl. 692 (N. J.); *Jones v. St. Johns College*, L. R. C. Q. B. 115; *Coal & Iron R. Co. v. Reherd*, 204 Fed. 859; *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 292; *Northern Irig. Co. v. Dodd*, 162 S. W. 946.

² 25 Conn. 530, 68 Am. Dec. 371.

³ And see to the same effect *Adams v. Nichols*, 19 Pick. 275, 31 Am. Dec. 137; *Fildew v. Besley*, 42 Mich. 100, 36 Am. Rep. 433.

⁴ *Harmony v. Bingham*, 12 N. Y. 99; and to the same effect *Eugster v. West*, 35 La. Ann. 119, 48 Am. Rep. 232; *Tobias v. Lissberger*, 105 N. Y. 401, 59 Am. Rep. 509.

⁵ *Knappman Co. v. Middlesex Water Co.*, 45 Atl. Rep. 692 (N. J.).

⁶ *Berg v. Erickson*, 234 Fed. 817.

selling land the vendor agreed to resell it for the vendee at a certain price if notified on a certain date, the vendor was not permitted to show in defense that it was impossible to obtain a purchaser at that price.¹ A financial stringency² or an inability to obtain money from sources on which a contractor relied to complete his contract will not discharge him.³ Where A contracts to take B into a firm of which he is a member, it is no excuse for his failure to do as he agreed that he cannot obtain the consent of the other partners.⁴ So, where a railroad company agreed unconditionally to make a connection for the promisee with another railroad company, non-performance was held not excused by the refusal of the latter company to permit the connection to be made.⁵ Temporary incapacity of a judge from intoxication does not excuse the performance of a promise to bring a case for trial before him.⁶ A contract by an employer to protect his servant against striking employes is not void for impossibility.⁷

§ 443. *Exceptions to the Rule.*

To the rule, however, there are two exceptions. First, where the performance is rendered impossible by act of the law. Second, where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or the thing or the state of things to which it relates. It would be more logical to say that these two cases are not so much exceptions to the rule stated in the last sections, as cases where the intention of

¹ Hurless v. Wiley, 91 Kas. 347, 137 Pac. 981; Hokanson v. West Land Co., 125 Minn. 74, 155 N. W. 1043.

² Ingham Lumber Co. v. Ingersoll, 93 Ark. 447, 125 S. W. 139.

³ Pratt v. McCoy, 128 La. 570, 54 South. 1012.

⁴ McNeil v. Reid, 9 Bing. 68.

⁵ Railroad Co. v. Reichert, 58 Md. 261.

⁶ Cobb v. Harmon, 23 N. Y. 148.

⁷ Hansen v. Dodwell Dock Co., 170 Pac. 346 (Wash.).

the parties is presumed or inferred, though not expressed, from their peculiar situation or from the subject-matter itself.¹

§ 444. *Same—First Exception.*

Where the performance becomes impossible by law,¹ either by reason of (a) a change in the law or (b) some action by or under the authority of the government, the promisor is discharged.²

(a) Thus, where one leased a piece of land and covenanted that only ornamental buildings should be erected on an adjacent tract retained by him, and the tract retained was sub-

¹ In *School Dist. v. Dauchy*, 25 Conn. 530, 68 Am. Dec. 371, the court said: "We believe the law is well settled that if a person promises absolutely, without exception or qualification, that a certain thing shall be done by a given time, or that a certain event shall take place, and that the thing to be done or the event is neither impossible nor unlawful at the time of the promise, he is bound by his promise, unless the performance before that time becomes unlawful. Any seeming departure from this principle of law (and there are some instances that at first view appear to be of that character) will be found, we think, to grow out of the mode of construing the contract or affixing a condition, raised by implication from the nature of the subject or from the situation of the parties, rather than from a denial of the principle itself; such, for instance, as a promise to marry, where it must be presumed that the parties agree to intermarry if they shall be alive; or a promise to deliver a certain horse at a future time, and before the day arrives the horse dies, in which case the parties are held to have contracted in view of that contingency. In these and like cases the court will hold that the parties did not understand that the thing was to be done, unless the life of the persons, or of the horse, was continued, so that there would be an object and an interest in the execution of the contract."

¹ The outbreak of a war in one's own country may make performance illegal and terminate liability. *Zinc Corp. v. Hirsch*, 1 K. B. 541 (1916).

² *Wade v. Mason*, 12 Gray, 335, 74 Am. Dec. 597; *Livingston v. Tompkins*, 4 Johns. Ch. 416, 8 Am. Dec. 598; *Jones v. Judd*, 4 N. Y. 411; *Baker v. Johnson*, 42 N. Y. 126; *Buffalo, etc., R. Co. v. R. R. Co.*, 111 N. Y. 132; *Semmes v. Ins. Co.*, 13 Wall. 158; *Osborn v. Nicholson*, 13 Wall. 654; *Moshenz v. Independent Order*, 215 Mass. 185. Note, that "law" means the law of one's own country and not the acts or laws of a foreign country. *Leake Contr.* 713; *Barker v. Hodgson*, 3 M. & S. 267.

sequently taken and used for a station by a railroad company under powers given to it by the legislature, it was held that the lessor was discharged from his covenant.³

So, a covenant in the lease of a wooden building to rebuild the same in case of fire, was decided to be released by the subsequent passage of a municipal ordinance prohibiting the erection of wooden buildings in that locality.⁴

The failure of a railroad that had agreed in accepting a conveyance of land to deliver an annual pass to the grantor for life, to continue to issue it, is excused, by the enactment of a statute prohibiting passes.⁵

(b) In *Re Shipton*,⁶ A had agreed to sell B a certain parcel of wheat, then lying in a Liverpool warehouse, but before delivery it was requisitioned by the Government. It was held that the vendor was discharged, the Court saying:

“It is true that the act to be performed was not rendered unlawful by an act of the Legislature since the entering into the contract, but it was a lawful act of state which equally rendered the delivery of these specified goods unlawful.”

A contract by a corporation with an individual to employ him for a stipulated time is dissolved by a dissolution of the corporation by judicial proceedings, taken by the State.⁷ So, where A agreed to pay B a certain price per bushel for hauling all coal sold by A to C, and C's business passed into the hands of a receiver, who purchased coal of A, under order of court, and employed A to haul it, it was held that B could not maintain an action against A for breach of contract.⁸

³ *Bailey v. De Crespigny*, L. R. 4 Q. B. 180.

⁴ *Cordes v. Miller*, 39 Mich. 581.

⁵ *Cowley v. R. Co.*, 68 Wash. 558, 123 Pac. 998.

⁶ 3 K. B. 676 (1915).

⁷ *People v. Globe Ins. Co.*, 91 N. Y. 174.

⁸ *Atkinson v. Schoonmaker*, 12 Mo. App. 425; *Malcolmson v. Wappoo Mills*, 88 Fed. 680. As to the appointment of a receiver as an excuse for nonperformance, see note to *Moller v. Herring*, 255

In *Hughes v. Wamsutta Mills*,⁹ in an action for wages the master set up a contract by the servant to give two weeks' notice of leaving the service, which had not been given because the servant had been arrested on a charge of adultery and imprisoned. It was held that this was a valid excuse.¹⁰

§ 445. *Same—Second Exception.*

Where, from the nature of the contract, it is evident that the parties contracted on the basis of the continued capacity or existence of the (a) person or (b) thing to which it relates, the subsequent incapacity or perishing of the person or thing will excuse the performance.

(a) Contracts to perform personal acts are considered as made on the implied condition that the party shall be alive or shall be capable of performing the contract.¹

Fed. 670, in 3 A. L. R. 627. Bankruptcy does not terminate liability. *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581.

⁹ 11 Allen. 201.

¹⁰ It was argued for the defendant in this case that as the arrest was the result of the voluntary act of the plaintiff in committing the crime for which he was arrested, it should therefore not be allowed to be taken advantage of by him. But the court very properly distinguished between the proximate cause of his not giving the notice which was his arrest by the officers of the law and the remote cause which was his commission of a crime, saying: "The same argument might be used in case of inability to continue in service, occasioned by sickness, or some bodily injury. It might be shown in such a case that some voluntary act of imprudence or carelessness led directly to the physical consequences which disabled a party from continuing his services under a contract." The same argument was in fact used with no better results in the later case of *K. v. Raschen*, 32 L. T. (N. S.) 38, where it was held that illness was a valid excuse for not rendering personal services under a contract, and it made no difference that the illness was caused by a venereal disease contracted through the servant's own fault.

¹ *Knight v. Bean*, 22 Me. 531; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Yerrington v. Greene*, 7 R. I. 589, 84 Am. Dec. 578; *Stewart v. Loring*, 5 Allen, 306, 81 Am. Dec. 747; *Siler v. Gray*, 86 N. C. 566; *Martin v. Hunt*, 1 Allen, 419; *Singleton v. Carroll*, 6 J. J. Marsh, 527, 22 Am. Dec. 95; *Lacy v. Getman*, 119 N. Y. 169; *Parker v. McComber*, 17 R. I. 674; *Levy v. Ins. Co.*, 155 Cal. 527, 105 Pac. 598; *Groff v. Hertenstein*, 39 Ohio C. C. 633. The other

In *Robinson v. Davidson*,² an action was brought for damage sustained by a breach of contract on the part of an eminent pianoforte player, who, having promised to perform at a concert, was prevented from doing so by dangerous illness. This was held a good excuse:

“This is a contract to perform a service, which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that, by virtue of the terms of the original bargain, incapacity of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional and not absolute.”³

Promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party, and therefore, in such cases the contract is in terms broken if the promisor die before fulfillment. Yet, it was very early determined that if the performance is personal, the executors are not liable.⁴ But in

party has also a right to rescind—the agreement is not simply voidable at the option of the party disabled. *Pollock Contr.* 376; *Leofold v. Salkey*, 89 Ill. 412.

² L. R. 6 Ex. 269; and see *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 40; a similar case.

³ A contract by an author to write a book or by a painter to paint a picture within a reasonable time would be deemed subject to the condition that if the author became insane or the painter paralytic and so incapable of performing the contract by the act of God, he would not be liable personally in damages any more than his executors would be if he had been prevented by death. *Pollock C. B. in Hall v. Wright*, E. B. & E. 793. This rule has been applied to excuse a workman from performing a contract of labor at a place where subsequently cholera broke out. *Lakeman v. Polard*, 43 Me. 463, 69 Am. Dec. 77.

⁴ *Stewart v. Stone*, 127 N. Y. 500. As to promises to marry, see ante, Chap. IX. As to contracts of service it is well settled that where complete performance is prevented by sickness or death, the contract is not broken. *Clark v. Gilbert*, 26 N. Y. 197, 84 Am. Dec. 189; *Fuller v. Brown*, 11 Metc. 440.

these cases the only ground on which the parties or their executors can be excused from the consequence of the breach of the contract is that, from the nature of the contract, there is an implied condition of the continued existence of the life of the contractor. It matters not whether the disability be temporary or permanent, the question is simply whether it is such as to prevent the fulfillment of the particular contract.⁵ And a promise to marry is conditional upon the continued physical and mental health of the parties.⁶

But no contract which can be performed by an agent is discharged by a cause of this kind; the rule is restricted to personal contracts of the character just shown.⁷

Where the contract does not intend the personal services of the promisor illness or indisposition is no excuse.⁸

(b) Where the contract relates to the use or possession or dealing with specific things in which the performance necessarily depends on the existence of the particular thing, or the occurrence of a particular state of things, the condition is implied by the law that the impossibility arising from the perishing or destruction of the thing, without default in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract.⁹

⁵ Pollock Contr. 376. The party should give reasonable notice—where he is able to do so—to the other party of the disabling accident. Pollock Contr. 376.

⁶ Allen v. Baker, 86 N. C. 91, 41 Am. Rep. 444; Shackelford v. Hamilton, 19 S. W. Rep. 5 (Ky.); Trammell v. Vaughan, 158 Mo. 214.

⁷ Pollock Contr. 378.

⁸ West Chicago Park v. Carmody, 139 Ill. App. 635; and see Vidor v. Peacock, 145 S. W. 672.

⁹ Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Lord v. Wheeler, 1 Gray, 282; Wells v. Calnan, 107 Mass. 514; Greene v. Linton, 7 Port. 133, 31 Am. Dec. 707; Powell v. R. R. Co., 12 Oreg. 488; The Tornado, 108 U. S. 342; Ward v. Vance, 93 Pa. St. 499; Walker v. Tucker, 70 Ill. 527; Gould v. Minch, 70 Me. 288; Brumby v. Smith, 3 Ala. 123; Thompson v. Gould, 20 Pick. 134; Appleby v. Myers, L.

“The principle is not limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject matter of the contract or of some condition or state of things expressly specified as a condition of it. You first have to ascertain not necessarily from the terms of the contract but if required from necessary inferences drawn from surrounding circumstances recognized by both contracting parties what is the substance of the contract and then to ask the question whether the substantial contract needs for its foundation the assumption of the existence of a particular state of things.”¹⁰

The leading case upon this subject is *Taylor v. Caldwell*.¹¹ There defendant agreed to let plaintiff have the use of a music hall for the purpose of giving concerts upon certain days; before the days of performance arrived the music hall was destroyed by fire, and plaintiff sued for losses arising from the consequent breach of contract. The court held that, in the absence of any express stipulation on the matter, the parties must be taken “to have contemplated the continuing existence” of the music hall “as the foundation of what was to be done;” and that therefore:

“In the absence of any express or implied stipulation that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.”

Several interesting cases growing out of the postponement through the King's illness of the coronation ceremonies of

R. 2 C. P. 651; *Clarkville Land Co. v. Haneman*, 68 N. H. 374; *Stewart v. Stone*, 127 N. Y. 500. In *Livingston v. Graves*, 32 Mo. 479, the defendant, who had agreed to keep a certain bridge in repair for three years, was held not bound to rebuild it, after it had been destroyed by fire. This is perhaps an extreme case, though it may be said that the intention was that there should be a bridge in existence to repair, and that “repair” could not be construed to mean “rebuild.”

¹⁰ *Krull v. Henry*, 2 K. B. 740 (1903).

¹¹ 3 B. & S. 826.

King Edward in 1902, illustrate this rule. Many persons, to see the procession, had rented rooms, windows and seats on stands erected on the streets through which the procession was to pass. A, who had rented his flat to B, for which he had promised to pay \$375 and had paid on account \$125, sued for the \$250, which B, as the procession did not materialize, refused to pay. But it was held that he could not recover, the Court saying:

“The use of the rooms was let and taken for the purpose of seeing the royal procession. It was not a demise of the rooms or even an agreement to let and take the rooms. It is a license to use the rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route which passed 56 Pall Mall was regarded by both contracting parties as the foundation of the contract. * * It is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and if the King before the coronation day and after the contract had died, the hirer could not have insisted on having the rooms on the days named.¹²

So in New York, where A agreed to pay for an advertisement in a program and souvenir book of the International Yacht Race to take place subsequently, but which was not held on account of the war, it was held that he was not liable on his promise.¹³

The Great War rendered during its time many commercial and other contracts impossible of performance. Contracts of carriage on the sea or for the delivery of goods in a foreign country were in many cases “frustrated” in the language of some English Judges by the subsequent breaking out of hostilities. There was therefore without the fault of either party such a change of conditions that to enforce perform-

¹² *Krull v. Henry*, 2 K. B. 740 (1903). See *Blakely v. Miller and Hearne Bay Steamboat Co. v. Hutton*, *post*.

¹³ *Alfred Marks Co. v. Rector*, 156 N. Y. S. 180.

ance would be beyond what was contemplated by the parties when they made their agreement.¹⁴ So where after the making of the contract the subject of it was requisitioned by the Government, either the basis of the contract had been destroyed or performance had been rendered illegal by the act of the State¹⁵ and was excused.¹⁶ But it is not enough that performance has become unprofitable or more difficult or dangerous.¹⁷

This exception and the general rule stated in the former section are very well illustrated by two cases with nearly the same facts. In the first a person contracted to deliver a certain quantity of a crop of potatoes to be raised on a particular piece of land, and the entire crop was destroyed by blight.¹⁸ In the second a person contracted to raise, sell, and deliver a specified quantity of beans of various kinds, no particular land on which they were to be raised being specified.¹⁹ In the first case it was held that the party was excused.

“Had the contract been simply for so many tons of potatoes of a particular quality, then, although each party might have had in his mind when he made the contract this particular crop of potatoes, if they had all perished, the defendant would still have been bound to deliver the quantity contracted for; for it would not have been within the rule of a contract as to a specific thing. But the contract was for 200

¹⁴ *Admiral Shipping Co. v. Weidner Co.*, 1 K. B. 429 (1916); *Graves v. Miami S. S. Co.*, 61 N. Y. S. 115.

¹⁵ *Post*.

¹⁶ *Re Shipton*, 3 K. B. 676 (1915). For a full discussion of all these cases see the notes to *Davison Chemical Co. v. Baugh Chemical Co.*, 104 Atl. 404; *Blackburn Robbin Co. v. Allen*, 2 K. B. 467 (1918); *Allenwide Trans. Co. v. Vacuum Oil Co.*, 249 U. S. 377, in 3 A. L. R. 21 and to *Standard Scale Co. v. Baltimore Enamel Co.*, 110 Atl. 486; *Brooke Tool Co. v. Hydraulic Gears Co.*, 89 L. J. K. B. N. S. 263, in 9 A. L. R. L. 1509.

¹⁷ *Piaggio v. Somerville*, 80 South. 342; *Graves v. Miami S. S. Co.* *supra*; *Elsev v. Stamps*, 10 Lea 709; *Dixon v. Henderson*, 117 L. T. 636; *Wilsons v. Tennants*, 1 K. B. 208 (1917); *Associated Post v. Cory*, 31 T. L. R. 442.

¹⁸ *Howell v. Coupland*, L. R. 9 Q. B. 462.

¹⁹ *Anderson v. May*, 50 Minn. 280, 52 N. W. 530.

tons of a particular crop in particular fields, and therefore there was an implied term in the contract that each party should be free if the crop perished.”

In the second case the court held that the fact that unexpected early frost so far destroyed the party's crops that he could not complete his contract was no excuse.

As has been pointed out ²⁰ had the contract in *Re Shipton* ²¹ not been for the delivery of specific wheat, the decision would have been different; for in that case the performance of the contract would not have been impossible, though it might have been more difficult and expensive.

Merely depriving a person of the full beneficial use of the subject matter of the contract through a change in the law does not create an impossibility.²²

In another of the English Coronation cases A had hired a steamboat from B for two days, on which it was announced that there would be a naval review by the King, stating that he was going to use it to take paid passengers to see the review and to sail around the fleet. The review being postponed on account of the King's illness, he refused to take or pay for the boat. In an action for damages it was held that the postponement of the review was no defense.²³ The decision was placed on two grounds, first, that the object of the passengers as to sight-seeing was not the basis of the contract. A had simply expressed his motive for the hiring, just as a man on hiring a cab might say, I am going to the races in it and they should be called off on account of an epidemic.

Second, the object of the excursion was to see the review and to cruise around the fleet. The fleet was still there on these days and the passengers might be willing to take the

²⁰ *Anson Contr.* § 378.

²¹ *Ante.*

²² *Conkling v. Silver*, 174 N. W. 573 (Ia.). See *Nichol v. Ashton Co.*, 2 K. B. 126 (1901).

²³ *Hearne Bay Steamboat Co. v. Hutton*, 2 K. B. 683 (1903).

trip to view it. There was therefore no total destruction of the subject of the contract.

§ 445a. *Contract Not Invalid.*

The contract is valid up to the time that the impossibility occurs. B, in the case in the last section, could not recover the \$125 he had paid.¹ In another Coronation case A having seen a plan of a structure which B proposed to erect on a street to view the procession chose and paid for three numbered seats \$75. The structure and seats were subsequently built, but when there was no procession, he brought an action to recover the money. But he failed.

“All that can be said is that when the procession was abandoned, the contract was off, not that anything done under the contract was void. The loss must remain where it was at the time of the abandonment.”²

Where the impossibility may not be permanent performance would be suspended and not discharged. A son in consideration of the conveyance to him by his mother of her land agreed to furnish her certain provisions and supplies and certain rooms in which to live, reside, during her life. She having been adjudged insane and removed to an asylum, it was held that the contract during this time could not be enforced by her guardian.³

§ 446. *Alternative Promises*

If a person contract to do one of two things, and at the time of making the contract one of them is possible and the

¹ Krell v. Henry, ante; Chandler v. Webster, 1 K. B. 493 (1904).

² Blakely v. Miller, 2 K. B. 760 (1903).

³ Penas v. Cherveney, 135 Minn. 437, 161 N. W. 150; Eastern State Hospital v. Goodman, 155 Ky. 628, 160 S. W. 171; Hilgar v. Miller, 42 Oreg. 552, 72 Pac. 319, removal to an old soldiers' home.

other impossible, he must perform that which is possible.¹ So, if both are possible when the contract is made but one subsequently becomes impossible, he is bound to perform the other.² Thus, a creditor who, in his receipt for a safe taken by him as collateral security, promised on payment of the debt to deliver the safe to the debtor, or its equivalent in money, was held liable for the value thereof where, without fault on his part, it was destroyed by fire while in his possession.³ And in no case is non-performance of a contract excused by the act of God, where it may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible.⁴

¹ Leake Contr. 716; Board of Education v. Townsend, 63 Ohio St. 514, 59 N. E. 223.

² Barkworth v. Young, 4 Drew. 7; State v. Worthington, 7 Ohio, 171; Jacquinet v. Boutron, 19 La. Ann. 30; Wilmington Trans. Co. v. Smith, 98 Cal. 1; contra, Smith v. Durell, 16 N. H. 344, 41 Am. Dec. 732.

³ Drake v. White, 117 Mass. 10.

⁴ Williams v. Vanderbilt, 28 N. Y. 217, 84 Am. Dec. 333; Board of Education v. Townsend, *supra*.

CHAPTER XV.

DISCHARGE BY OPERATION OF LAW.

Section 447. Introductory.

(A) MERGER.

- 448. Merger Described.
- 449. Requisites to Merger.

(B) ALTERATION OF WRITTEN INSTRUMENTS.

- 450. Alteration Avoids Instrument.
- 451. Presumption as to Alterations.
- 452. Law and Fact.
- 453. Recovery upon Original Consideration.
- 454. Right to Fill Blanks in Instruments.

(C) LOSS OF WRITTEN INSTRUMENTS.

- 455. Effect of Loss of Written Instrument.

(D) BANKRUPTCY.

- 456. Bankruptcy Law Discharges Obligations.

(E) DEATH.

- 457. Discharge of Contract by Death.

§ 447. *Introductory.*

Discharge of a contract by Operation of Law, wholly without reference to any such intention of the parties, may occur in five ways: (a) by merger, (b) by alteration of a written instrument, (c) by loss of a written instrument, (d) by bankruptcy, (e) by death.

(a)

MERGER.

§ 448. *Merger Described.*

Merger is an operation of law which extinguishes a right by reason of its coinciding with another right of greater legal worth in the same person.¹ Where a judgment is recovered upon either a simple contract or a contract under seal, the remedy upon them is merged in the judgment.² Where two parties to a simple contract subsequently covenant regarding the same matter in a deed, the simple contract is thereby discharged, being merged in the specialty.³ This is really a discharge by a substituted agreement.

The doctrine of merger applies by mere operation of law, independently of any intention of the parties, and without any express or implied agreement between them that the inferior remedy should be extinguished.⁴

§ 449. *Requisites to Merger.*

The requisites to a merger are:

(a) The two securities must be different in their legal op-

¹ Rap. & L. Law Dict; *Baker v. Baker*, 28 N. J. L. 13, 75 Am. Dec. 243; *Wann v. McNulty*, 2 Gilm. 355; 43 Am. Dec. 58.

² *Wayman v. Cochrane*, 35 Ill. 152; *Runnamaker v. Cordrey*, 54 Ill. 303. But not a foreign judgment. *Eastern Tp. Bank v. Beebe*, 53 Vt. 177, 38 Am. Rep. 665; *Nat. Bank v. Peabody*, 55 Vt. 492, 45 Am. Rep. 632; *Pike v. Smith (Me.)*, 115 A. 283.

³ *McDonald v. Ingraham*, 30 Mass. 389, 64 Am. Dec. 166; *McNaughton v. Partridge*, 11 Ohio, 223, 38 Am. Dec. 731; *Clifton v. Jackson Iron Co.*, 74 Mich. 183, 16 Am. St. Rep. 621 note; *Shoonmaker v. Hoyt*, 148 N. Y. 425. Taking a note does not extinguish alien. *The Charlotte v. Hammond*, 9 Mo. 58, 43 Am. Dec. 536. In Illinois a party, being liable upon a replevin bond, promised in writing to pay the amount of his liability by the next term of court, if no suit was brought on the bond, but the bond was not released. It was held, that no action would lie upon the subsequent promise, as it could not merge or destroy the higher security. *Leland v. Barry*, 69 Ill. 348.

⁴ *Price v. Moulton*, 10 C. B. 561; *Brazill v. Weed*, 190 N. Y. S. 43.

eration,¹ the one of a higher efficacy than the other.² A second security taken in addition to one similar in character will not affect its validity³ unless there be discharge by a substituted agreement.⁴

(b) The two securities must be co-extensive; that is, the new and superior security must be for the same debt and between the same parties.⁵

(b)

ALTERATION OF WRITTEN INSTRUMENTS.

§ 450. *Alteration Avoids Instrument.*

If a contract in writing be altered by an addition, interlineation or erasure it is discharged,¹ though of course the other party is not precluded from availing himself of it further than by the difficulty of proving its original state.²

An alteration by a stranger, without the participation of

¹ Though we have seen that all negotiations and agreements which precede the execution of a written contract are not admissible to explain or contradict it, as they are considered as merged in the writing (ante, § 379), yet this is a rule of evidence merely and not "merger" as that word is used here, for the contract in writing is of no higher nature than the oral one.

² Thus a bond taken for another bond does not merge the former. *Andrews v. Smith*, 9 Wend. 53; *Weakley v. Bell*, 9 Watts, 280, 36 Am. Dec. 116; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551.

³ A superior right is never merged in an inferior.

⁴ Where parties made a new contract on the same subject as the old, the last one is considered as a substitute for the other, though there is strictly no "merger." See *Stow v. Russell*, 36 Ill. 18; *Hargrave v. Conroy*, 19 N. J. (Eq.) 281.

⁵ *Whitbeck v. Wayne*, 16 N. Y. 532; *Hutchins v. Hebbard*, 34 N. Y. 24; *Norfolk Bank v. McNamara*, 3 Ex. 628; *Jones v. Johnson*, 3 W. & S. 276, 38 Am. Dec. 760; *Doty v. Martin*, 32 Mich. 462; *Stockton v. Gould*, 149 Pa. St. 68; *Cons. Co. v. Craig*, 191 N. Y. S. 283.

¹ 9 Cyc. 635; 2 Cyc. 137; *Smith v. Mace*, 44 N. H. 753.

² *Leake Contr.* 811; *Martin v. Ins. Co.*, 101 N. Y. 498; *Drum v. Drum*, 133 Mass. 566; *Greer v. R. Co.*, 96 Pa. St. 391, 42 Am. Rep. 548; *Condict v. Flower*, 106 Ill. 105.

the party interested, is called a spoliation of the instrument, not changing its legal operation, so long as the original writing remains legible.³

The ground of this strict rule is public policy for the protection of legal instruments from fraud and substitution. The purpose is to keep interested parties from tampering with them, by the risk of forfeiting them in case of detection.⁴

The general rule is subject to the following subsidiary rules, viz.:

1. The alteration must be made by a party to the instrument or with his procurance or connivance.⁵ It does not avoid the writing where it is made by the party's agent⁶ or by one in whose custody it has been left for safekeeping.⁷

2. The alteration must be made after the execution and delivery of the instrument.⁸

3. The alteration must be made without the consent of the other party, or his subsequent ratification, or it will operate

³ Bridges v. Winters, *post*.

⁴ Benj. Princ. Contr. 128.

⁵ Bridges v. Winters, 42 Miss. 135, 2 Am. Rep. 598; Warring v. Smyth, 2 Barb. Ch. 119, 47 Am. Dec. 299; Hunt v. Gray, 35 N. J. (L.) 227, 10 Am. Rep. 232; Louis v. Payn, 8 Cow. 71, 18 Am. Dec. 427; Lee v. Alexander, 9 B. Mon. 25, 48 Am. Dec. 412; Gleason v. Hamilton, 138 N. Y. 353; Drum v. Drum, 133 Mass. 568; Condict v. Flower, 106 Ill. 105; Hord v. Taubman, 79 Mo. 101; Gleason v. Hamilton, 138 N. Y. 353.

⁶ Collins v. Makepeace, 13 Ind. 448; Hunt v. Gray, 35 N. J. (L.) 227, 10 Am. Rep. 232; Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418; Moore v. Ivèrs, 83 Mo. 29.

⁷ Yeager v. Musgrave, 28 W. Va. 90, *contra*; Vance v. Lowther, 1 Ex. Div. 176, where a dishonest clerk had absconded with a check drawn in his master's favor. After altering the date from March 2nd to March 26th, he passed it to the plaintiff for value. It was held that the alteration was material and invalidated the check, so that the plaintiff, in spite of having acted prudently and up-rightly, could not sue the drawer.

⁸ Britton v. Stanley, 4 Whart. 134; Hunt v. Gray, 35 N. J. (L.) 227; Winkler v. Gunther, 25 S. E. 527 (Ga.).

as a new agreement.⁹ This assent may of course be either express or implied. Where there are several promisors those consenting to the alteration are bound thereby, while the rest are discharged.¹⁰

4. The alteration must be a material one, for even though made with a fraudulent intent an immaterial alteration does not vitiate the instrument.¹¹ To be a material alteration it must change in some way its meaning or its legal effect,¹² and hence an alteration is immaterial if neither the rights or interests, duties or obligations, of either of the parties are in any manner changed.¹³

But a material alteration may avoid the instrument even though no contractual rights are affected. In *Suffell v. Bank*¹⁴ it was held that the alteration of a Bank of England note by erasing the number upon it and substituting another was a material alteration which avoided the instrument, so that a *bona fide* holder for value could not afterwards maintain an action on it. Here, says Anson,¹⁵ the bank's promise to pay was not affected, but that the number

⁹ *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499; *Stewart v. Bank*, 40 Mich. 348; *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 632; *Wooley v. Constant*, 4 Johns. 54, 4 Am. Dec. 246; *Pelton v. Prescott*, 13 Iowa, 567; *Wilson v. Henderson*, 9 Smedes & M. 375, 48 Am. Dec. 716; *Canon v. Grigsby*, 116 Ill. 151, 56 Am. Rep. 769.

¹⁰ *Warring v. Williams*, 8 Pick. 322; *Myers v. Nell*, 84 Pa. St. 369; *Gardiner v. Harback*, 21 Ill. 129; *Canon v. Grigsby*, 116 Ill. 151.

¹¹ *Robinson v. Ins. Co.*, 25 Iowa, 430; *Miller v. Reed*, 27 Pa. St. 246, 67 Am. Dec. 459; *Morrison v. Grigsby*, 78 Mo. 434.

¹² *Nichols v. Johnson*, 10 Conn. 192; *Wymon v. Yoemans*, 84 Ill. 403; *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598; *Munn v. Hoyt (La.)*, 91 S. 169.

¹³ *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Light v. Killenger*, 44 N. E. Rep. 760 (Ind.); *Kelly v. Thuey*, 143 Mo. 422, 37 S. W. Rep. 516. Where an instrument is in duplicate the alteration of one copy only does not affect the contract. *Lewis v. Payne*, 8 Cow. 71, 18 Am. Dec. 427.

¹⁴ 9 Q. B. 555.

¹⁵ *Contr.* § 424.

plays an important part in the detection of forgery and theft caused the alteration to be regarded as material.

5. It must be made with a fraudulent intent. While there are cases holding that even an innocent material alteration will vitiate the instrument,¹⁶ the better opinion now is that where an alteration is made by accident or honestly under a mistake of fact as to the rights of the parties it will not prejudice the promisee.¹⁷

6. The instrument must be an executory obligation. The alteration of a deed or other agreement is not retroactive; it does not affect its past operation as to anything done, or any estate, right, or title vested under it.¹⁸ But it ceases to have any new operation; and no action can be brought in respect of any pending obligation which would have arisen from it had it remained entire, and hence an alteration of a deed may avoid the covenants therein.¹⁹

7. A person may in some cases be estopped from setting up a fraudulent alteration as against a third party. For example, if the maker of a bill, note or check issues it in such a state that it may easily be altered for a larger amount he will be liable to a *bona fide* holder who has taken it for value before maturity.²⁰

¹⁶ *Morrison v. Garth*, 78 Mo. 434; *Barnett v. Nolte*, 55 Mo. (App.) 184; *Otto v. Half*, 34 S. W. Rep. 910 (Tex.).

¹⁷ *Horst v. Wagner*, 43 Ia. 373, 22 Am. Rep. 255; *Rogers v. Shaw*, 59 Cal. 260; *Cochran v. Nebeker*, 48 Ind. 459; *Nickerson v. Swett*, 135 Miss. 518; *Citizens Nat. Bk. v. Williams*, 174 Pa. St. 66.

¹⁸ *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299; *Van Horn v. Bell*, 11 Iowa, 465, 79 Am. Dec. 506.

¹⁹ *Chessman v. Whittemore*, 23 Pick. 231; *Kendall v. Kendall*, 12 Allen, 92; *Herrick v. Malin*, 22 Wend. 388.

²⁰ *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Leas v. Wells*, 101 Pa. St. 57, 47 Am. Rep. 699; *Brown v. Reed*, 70 Pa. St. 370, 21 Am. Rep. 75; *Rainbolt v. Eddy*, 34 Ia. 440, 11 Am. Rep. 152; *Hall v. Bank*, 5 Dana, 258, 30 Am. Dec. 685. But see *Burrows v. Klunk*, 70 Md. 451; *Holmes v. Trumper*, 22 Mich. 247, 7 Am. Rep. 661.

§ 451. *Presumption as to Alterations.*

Alterations are presumed to have been made before execution and delivery, and the burden is on the party endeavoring to prove that the paper is vitiated by such alteration to show the contrary.¹ But where the alteration is in a different handwriting from the rest of the instrument, or in a different ink, or is in the interest of the party setting it up, or is suspicious on its face, or its execution is denied under oath, the party producing the instrument is bound to satisfactorily explain the alteration.²

§ 452. *Law and Fact.*

The question whether or not a paper has been altered is a question of fact for the jury;¹ so is the question whether it was altered before or after its execution and delivery,² or whether it was done with the maker's consent.³ But whether an alteration is a material one is a question of law for the court.⁴

§ 453. *Recovery Upon Original Consideration.*

Where the instrument is altered under circumstances which do not discharge it, as shown in the foregoing rules, as where

¹ Lawson Presumptive Ev. Rule 84; Burnett v. McClary, 78 Mo. 676; Re Nagle, 134 Pa. St. 31, 19 A. S. R. 669.

² Id., Rule 85; Stidwell v. Patton, 108 Mo. 360; Thompson v. Gowen, 79 Ga. 70; Jones v. Mining Co. (N. M.), 198 P. 287.

³ Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258; Bliss v. McIntyre, 18 Vt. 466, 46 Am. Dec. 165; Clark v. Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307.

⁴ Hunt v. Gray, 35 N. J. (L.) 227, 10 Am. Rep. 233; Bailey v. Taylor, 11 Conn. 531, 29 Am. Dec. 321; Bank v. Morrison, 17 Neb. 341, 52 Am. Rep. 417; Anderson v. College (Ill.), 132 N. E. 826.

³ Jacobs v. Gilreath, 22 S. E. Rep. 757 (S. C.); Huckaby v. Holland (Ark.), 233 S. W. 913.

⁴ Stephens v. Graham, 7 Serg. & R. 508, 10 Am. Dec. 485; Steele v. Spencer, 1 Pet. 552; Winkles v. Gunther, 25 S. E. 527 (Ga.).

it is made innocently, though the identity of the instrument may be destroyed, the promisee may still recover upon the original consideration or debt for which it was given.¹ Yet this will not be allowed: 1. Where the rights of third parties will be prejudiced if the plaintiff be permitted to withdraw from the position assumed by such alteration;² 2. Where the original consideration of the contract between the parties, upon which it is sought to recover, has been merged in the consideration of the instrument altered;³ and, of course, where the instrument has been fraudulently altered so as to discharge it, there can be no recovery on the original consideration.⁴

§ 454. *Right to Fill Blanks in Instruments.*

Where a person, intending to enter into an obligation, signs the paper wholly in blank, or blank in certain particulars, he impliedly gives authority to the holder to fill the blanks in accordance with the general character of the instrument.¹ Thus, where the date in a bill of exchange is left blank,² or

¹ *Vogle v. Ripper*, 34 Ill. 100, 95 Am. Dec. 298; *Lewis v. Schenck*, 18 N. J. (Eq.) 459, 90 Am. Dec. 631; *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766; *State Savings Bank v. Shaffer*, 9 Neb. 1, 31 Am. Rep. 394.

² *Alderson v. Langdale*, 3 B. & Ad. 660.

³ *Whitmar v. Frye*, 10 Mo. 348; *Waring v. Smith*, 2 Barb. Ch. 119; *Mills v. Starr*, 2 Bailey, 359. See *ante*, § 449, *Merger*.

⁴ *Kennedy v. Crandall*, 3 Lans. 1; *Blade v. Noland*, 12 Wend, 173 27 Am. Dec. 126; *Newell v. Mayberry*, 3 Leigh, 250, 26 Am. Dec. 261.

¹ *Bank v. McChord*, 4 Dana, 119; *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Redlich v. Doll*, 54 N. Y. 234; 13 Am. Rep. 573; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Garrard v. Hadan*, 67 Pa. St. 82, 5 Am. Rep. 412; *Angle v. Ins. Co.*, 92 U. S. 330; *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427; *Witte v. Williams*, 8 S. C. 290, 28 Am. Rep. 294; *Caborn v. Nebb*, 56 Ind. 96, 24 Am. Rep. 15; *Johnson Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 37.

² *Mitchell v. Culver*, 7 Cow. 336; *Page v. Morrell*, 3 Abb. App. Dec. 433.

the time of payment,³ or the place of payment,⁴ authority is implied to fill them.

A paper intended for a deed which has nothing but the signatures and the seals cannot, after its delivery, be filled up so as to make it a good deed.⁵ But where the deed is substantially made, and it is put in the hands of an agent with certain blanks left for him to fill out, it is valid and binding after the blanks are filled.⁶

(c)

LOSS OF WRITTEN INSTRUMENTS.

§ 455. *Effect of Loss of Written Instrument.*

At common law there could be no recovery on a lost bond, because the courts required of every instrument sued on, what was called *profert* and *oyer*; that is, the production of the writing that the defendant might hear it read in open court.¹ Equity, however, dispensed with this upon the party giving a bond of indemnity (a thing a court of law could not order) for the protection of the obligor if he should be made to pay it again.² Profert and Oyer are no longer required in

³ Wilson v. Henderson, 9 S. & M. 375, 48 Am. Dec. 716.

⁴ Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573.

⁵ United States v. Nelson, 2 Brock. 64; Gilbert v. Anthony, 1 Yerg. 69, 24 Am. Dec. 439; Perminter v. McDaniel, 1 Hill (S. C.), 267, 26 Am. Dec. 179; Sigfried v. Leran, 6 Serg. & R. 308, 9 Am. Dec. 427; Duncan v. Hodges, 4 McCord, 239, 17 Am. Dec. 734. But see Pierce v. Arbuckle, 22 Minn. 417.

⁶ Duncan v. Hodges, 4 McCord, 239, 17 Am. Dec. 734; Texeira v. Evans, cited in Master v. Miller, 1 Anstr. 228; Field v. Stagg, 52 Mo. 356, 14 Am. Rep. 435; Inhabitants v. Huntress, 53 Me. 89, 87 Am. Dec. 535; Van Etta v. Everson, 28 Wis. 37, 9 Am. Rep. 486; McGregory v. McGregory, 107 Mass. 543; Schwartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; McNabe v. Young, 81 Ill. 11; *contra*, Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266.

¹ Snell Eq. 357.

² Id.

our courts³ and the loss of a written instrument only affects the rights of the parties in so far as it occasions a difficulty of proof.⁴

But in the case of negotiable instruments, if the holder of a bill, note or check lose it, he can neither recover on it nor upon the consideration for which it was given.⁵ By the statutes of most of the States, if he offers to the party primarily liable upon the instrument indemnity against possible claims, he may recover upon it.⁶

(d)

BANKRUPTCY.

§ 456. *Bankrupt Law Discharges Obligations.*

A discharge in bankruptcy will, subject to the limitations, if any, imposed by law, release the bankrupt from all obligations on contract debts and liabilities provable against his estate in bankruptcy. An action for breach of a covenant in a deed is barred by the subsequent discharge in bankruptcy of the covenantor.¹ Bankruptcy also discharges, *ipso facto*, contracts of agency and service and contracts of partnership.²

³ *Fales v. Russell*, 16 Pick. 315; *Almy v. Reid*, 10 Cush. 421.

⁴ *James v. McGuire* (Va.), 111 S. E. 136; *Brinkman v. Luhrs*, 60 Mo. (App.) 512; *Blade v. Noland*, 12 Wend. 173. But not where the holder has voluntarily destroyed the note sued on. *Blade v. Noland*, 12 Wend. 173.

⁵ *Hansard v. Robinson*, 7 B. & C. 90; *Crowe v. Clay*, 9 Ex. 604; *Moses v. Trice*, 21 Gratt, 556, 8 Am. Rep. 609.

⁶ A note destroyed after maturity may be sued on without indemnity being given. *Filby v. Turner*, 47 Pac. Rep. 1037 (Colo.).

¹ *Reed v. Pierce*, 36 Me. 455, 58 Am. Dec. 761; *Kirstein, etc., Co.*, v. *Belsinger*, 39 Pa. Dist. 180.

² *Lawson Rights*, Rem. & Pr., §§ 48, 49, 284, 671.

(e)

DEATH.

§ 457. *Discharge of Contract by Death.*

Only a very limited class of contracts are discharged by the death¹ of the promisor, and they are those which are expressly or impliedly limited to or conditional upon the life of the promisor, as contracts to marry,² and contracts which depend for their performance upon the personal qualities or skill of the promisor,³ as for example, contracts of service.⁴ But the death of one of the contracting parties does not discharge his part of the agreement, where it is of such a character that it can be performed by his personal representative.⁵

Death operates as we have seen⁶ as an assignment in law of all the personal estate of the deceased to his executor or administrator, subject to the liabilities of the deceased chargeable against it.⁷

The death of the promisee may discharge the promise. For example, where a master agreed to pay certain wages, and to leave her a certain sum in his will, it was held that the death before that of the master of the servant terminated the contract.⁸

¹ See *Griggs v. Smith*, 82 Ga. 392.

² *Chamberlain v. Williams*, 4 M. & S. 415; *Wade v. Kalbfleisch*, 16 Abb. Pr. (N. S.) 104; *Cohen v. Morneau* (Me.), 114 A. 307.

³ *Wills v. Murry*, 4 Ex. 866; *Shulz v. Johnson*, 5 B. Mon. 497; *Billings' Appeal*, 106 Pa. St. 558.

⁴ *Yerrington v. Greene*, 7 R. I. 559, 84 Am. Dec. 578; *Clark v. Gilbert*, 26 N. Y. 279, 84 Am. Dec. 189.

⁵ *Hawkins v. Ball*, 18 B. Mon. 816, 68 Am. Dec. 755; *Cox v. Martin*, 21 South. Rep. 611 (Miss.)

⁶ Ante, § 373.

⁷ *Hawkins v. Ball*, 18 B. Mon. 816, 68 Am. Dec. 755; *Pahlman v. King*, 49 Ill. 266; *Green v. Rugely*, 23 Tex. 539.

⁸ *Leahy v. Cheney*, 90 Conn. 61, 98 Atl. 132, and note L. R. A. 1917 D. 812.

CHAPTER XVI.

DISCHARGE BY BREACH.

Section 458. Right of Action and Discharge Caused by Breach Distinguished.

459. In What Modes Contract Discharged by Breach.

(A) DISCHARGE BEFORE PERFORMANCE DUE.

1. *By Renunciation.*

460. Breach by Renunciation Before Time Set for Performance.

2. *By Impossibility.*

461. Breach by Impossibility Created by Party.

(B) DISCHARGE IN COURSE OF PERFORMANCE.

1. *By Renunciation.*

462. Breach by Renunciation in Course of Performance.

2. *By Impossibility.*

463. Breach by Impossibility Created by Party.

§ 458. *Right of Action and Discharge Caused by Breach Distinguished.*

If one of the parties to a contract breaks his obligation, a new one arises in favor of the other one, viz., a right of action for the breach. And in some cases the breach will wholly discharge the injured party from performing his promise. But though every breach of the contractual obligation confers a right of action upon the injured party, every breach does not necessarily discharge him from doing what he has undertaken

to do under the contract. The contract may be broken wholly or in part; and if in part, the breach may or may not be sufficiently important to operate as a discharge, or the promise of one party may be absolute and quite independent of the promise of the other. It is therefore sometimes difficult to ascertain whether or not a breach of one of the terms of a contract *discharges* the party who suffers by the breach. By *discharge* is meant not merely the right to bring an action upon the contract because the other party has not fulfilled its terms, but the right to consider oneself exonerated from any further performance under the contract—the right to treat the legal relations arising from the contract as having come to an end, and given place to a new obligation, a *right of action*.¹

§ 459. *In What Modes Contract Discharged by Breach.*

A contract may be discharged through its breach by one of the parties, in three modes: 1. By his renouncing his liabilities under it. 2. By his making it impossible that he can perform his promise. 3. By his totally or partially failing to perform his promise. The first two modes may take place while the contract is still wholly executory, *i. e.*, before either party is entitled to demand a performance by the other of his promise. The last can, of course, take place at or during the time for the performance of the contract.

We consider, then, in this chapter: (a) Discharge before performance is due: 1, by renunciation, and, 2, by impossibility. (b) Discharge during performance: 1, by renunciation, and, 2, by impossibility. And in the next chapters we will consider: (c) Discharge by failure to perform.

¹ Anson Contr. 277.

(a)

DISCHARGE BEFORE PERFORMANCE DUE.

1. *By Renunciation.*§ 460. *Breach by Renunciation Before Time Set for Performance.*

The parties to an agreement which is wholly executory have a right to something more than its performance when the time arrives. They have a right to the maintenance of the contractual relation up to that time,¹ as well as to a performance when due.

“The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for the performance has arrived. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests.”

Another reason is that the anticipatory repudiation may cause immediate loss in property values, disturbs the mind of the promisee and an immediate action makes for an early settlement of the dispute and a timely payment of damages.³ A third is that after the renunciation, the promisee ought to be at liberty to consider himself absolved from further performance and to realize his damages at once, and not to be

¹ *Hochster v. De la Tour*, 2 El. & Bl. 678; *Grace v. Motor Co.* (U. S.), 278 Fed. 951.

² *Frost v. Knight*, L. R. 7 Ex. 111. Anson (Contr. 290) says: “It would seem needless to imply a promise in order to give the plaintiff a right of action. A contract is a contract from the time it is made, and not from the time that performance of it is due; if this is so, it is needless and clumsy to introduce into every contract an implied promise that, up to a certain period of its existence, it shall not be broken.”

³ Anson Contr. 3d. Am. Ed. 443.

required to continue ready and willing to perform his part of the agreement.⁴

But whether the first or second or third reason is the sounder, it is well settled that a renunciation or repudiation of an agreement by one of the parties before the time for performance has come, discharges the other, if he so chooses, and entitles him to sue at once for a breach.⁵

In *Hochster v. De la Tour*,⁶ A engaged B upon the twelfth of April to enter into his service as courier and to accompany him upon a tour; and the employment was to commence on the first of June. On the eleventh of May A wrote to B to inform him that he should not require his services. B at once brought an action, although the time for performance had not arrived, and the court held that he was entitled to do so. So an action for breach of promise will lie at once, upon a positive refusal to perform a contract of marriage, although the time specified for the performance had not arrived.⁷

There are, however, several limitations to this rule, viz.:

1. The renunciation must be distinct and unequivocal. A mere expression of intention not to perform is not a breach; it requires an absolute refusal to perform, which must be treated and acted upon as such by the party to whom the promise was made⁸

“No precise form of words was necessary . . . the obligation of the contract being created a denial of its existence

⁴ Campbell, C. J., in *Hochster v. De la Tour*.

⁵ 9 Cyc. 636; 13 C. T. 651; *Roehm v. Horst*, 178 U. S. 1. This doctrine is criticised in *Daniels v. Newton*, 114 Mass. 530, 19 Am. Rep. 384, and is not the law in Massachusetts or Nebraska. *Carstens v. McDonald*, 38 Neb. 858, or North Dakota, *Stanford v. McGill*, 6 N. D. 536. It is criticized also in *Ashley Contr.*, § 102.

⁶ 2 El. & Bl. 678.

⁷ *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Kurtz v. Frank*, 76 Ind. 594, 40 Am. Rep. 275; *Kennedy v. Rodgers*, 44 Pac. 47 (Kas.); *Frost v. Knight*, *supra*; *Ross v. Tabor* (Cal. A.), 200 P. 971.

⁸ *U. S. v. Smoot*, 15 Wall. 36; *Dingley v. Oler*, 117 U. S. 503; *Johnstone v. Milling*, 16 Q. B. 159; *Avery v. Bowden*, *post*; *Carstens v. McDonald*, 57 N. W. 757.

was equivalent to a refusal to allow her to enter upon the service. . . . The sole inquiry is whether he has done an act inconsistent with the supposition that the service continues.”⁹

2. The rule does not apply where repudiation is only partial, as in the case of a lease containing several covenants and there is a refusal to comply with a particular covenant not going to the whole consideration.¹⁰

3. The rule does not apply to unilateral contracts, or the contracts for the payment of money at a future time, nor could one make his mortgage become due by repudiating it in advance.¹¹ A man may say to the holder of his note, “I am not going to pay it.” But until payment is refused when it falls due, no legal right of his has been violated by the maker.¹²

4. The promisee is not bound to treat the renunciation as a breach, but he may insist on performance up to the time it is due.¹³ But if he continues to treat the contract as operative, it remains in existence for the benefit and at the risk of both parties; the promisor is enabled to perform the contract, and if anything occurs to discharge it from other causes, the promisor may take advantage of such discharge.¹⁴

In *Avery v. Bowden*,¹⁵ A agreed with B by charter-party that his ship should sail to Odessa, and there take a cargo

⁹ Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 283; Hosmer v. Wilson, 7 Mich. 294, 74 Am. Dec. 716; Zuck v. McClure, 98 Pa. St. 541; Vittum v. Estey, 67 Vt. 158, 31 Atl. 144.

¹⁰ Johnstone v. Milling, 16 Q. B. 460; Wilson v. Phillips, 2 Bing. 13; Obermeyer v. Nichols, 6 Binn. 159.

¹¹ Burtis v. Thompson, 42 N. Y. 246. In *Kelly v. Ins. Co.* the Court declined to apply the doctrine where a mutual life insurance company was charged with having wrongfully declared an insurance contract void and forfeited.

¹² Id. See *Emory v. Smelting Co.*, 60 N. E. Rep. 377.

¹³ Zuck v. McClure, 98 Pa. St. 541; *Kadish v. Young*, 108 Ill. 170.

¹⁴ *Kadish v. Young*, 108 Ill. 181; 48 Am. Rep. 548; *Howard v. Daly*, 61 N. Y. 375, 19 Am. Rep. 288. See *Perkins v. Fraser*, 107 La. 390, 31 South. Rep. 773.

¹⁵ 5 El. & Bl. 714.

from B's agent, which was to be loaded within a certain number of days. The vessel reached Odessa, and her master demanded a cargo, but B's agent refused to supply one. Although the days within which A was entitled to load the cargo had not expired, his agent, the master of the ship, might have treated this refusal as a breach of contract and sailed away. A would then have had a right to sue upon the contract. But the master continued to demand a cargo, and before the prescribed days were out—before therefore a breach by non-performance had occurred—a war broke out between England and Russia, and the performance of the contract became legally impossible. Afterwards A sued for breach of the charter-party, but it was held that as there had been no actual failure of performance before the war broke out (for the prescribed days had not then expired), and as the renunciation of the contract had not been accepted as a breach by A's agent, B was entitled to the discharge of the contract which took place upon the declaration of war.

There was a contract between a brother and sister in which the former promised to furnish the latter with board and lodging during her life and she promised to leave him all her property by will. After twelve years she left his house, notifying him that she would not return and died without leaving him the property. An action by the brother for the value of the board and lodging was held barred by the statute of limitations which began to run when his right to sue for the breach arose, viz., when she left his house.¹⁶

5. The repudiating party cannot force the other, nor is the other bound, to sue for a breach of the contract before the day fixed for performance arrives, and have the damages assessed as of the time of the repudiation. The party keeping the contract, in other words, need not mitigate the damages by treating as final the premature repudiation.¹⁷

¹⁶ *Henry v. Rowell*, 64 N. Y. S. 488, 63 N. Y. App. Div. 620.

¹⁷ *Kadish v. Young*, 108 Ill. 170, 48 Am. Rep. 548; *Davis v. Bron-*

Thus in an Illinois case,¹⁸ A in December 15, 1880, sold to B to be delivered during the month of January, 1881, 100,000 bushels of barley. On the 16th, the day after the sale, B notified A that he did not consider himself bound by the contract, and that he would not carry it out. It was held that A had a right, notwithstanding such notice, to wait until the day of delivery under the contract arrived, and then resell it in the market and recover from B the difference between the contract price of the barley and its market price at the day it was to have been delivered. And that there was no duty upon him to sell the barley on the day of or a reasonable time after the notice, although by a sale at such time the damages would have been greatly reduced, barley having gone down in price in the meantime.

6. After notice of such repudiation the other party cannot go on and complete an executory contract, and then sue for the full contract price or for any increased damages caused by his continuing to perform.¹⁹ B agreed to purchase of A five carloads of potatoes to be delivered as called for by him and after the first carload was received, potatoes fell in price in the market and B thereupon wrote to A not to purchase any more until they should hear from him. It was held that after A received this notice he had no right to purchase on B's account any more potatoes.²⁰

“While a contract is executory, a party has the power to stop performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the con-

son, 3 N. D. 300; 50 N. W. Rep. 836. But see *Truax v. Estes*, 92 Fed. Rep. 529.

¹⁸ *Kadish v. Young*, *supra*.

¹⁹ *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Davis v. Bronson*, 3 N. D. 300, 50 N. W. Rep. 836; *Moline Co. v. Beed*, 3 N. W. Rep. 96 (Ia.); *City of Nebraska v. Coke Co.*, 2 N. W. Rep. 870 (Neb.)

²⁰ *Danforth v. Walker*, 37 Vt. 239, 40 Vt. 457; *Cooperage Co. v. Stave Co.* (Ky.), 237 S. W. 412.

tract. The party thus forbidden cannot afterwards go on and increase the damages and then recover such increased damages of the other party.”

B employed A to clean and repair certain pictures for an agreed price, but before the work was completed countermanded the order. A, however, went on and finished the work and sued for the price agreed upon, claiming that B could not countermand the order after the work was begun. He recovered judgment, which was reversed on appeal.

“The plaintiff was allowed to recover as though there had been no countermand of the order and in this the court erred. The defendant by requiring the plaintiff to stop work upon the paintings, violated his contract and thereby incurred a liability to pay such damages as the plaintiff should sustain. Such damages would include a recompense for the labor done and materials used, and such further sum in damages as might, upon legal principles, be assessed for the breach of the contract; but the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would otherwise have been. To hold that one who employs another to do a piece of work is bound to suffer it to be done at all events would sometimes lead to great injustice. A man may hire another to labor for a year, and within the year the situation may be such as to render the work entirely useless to him. The party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment. So if one hires another to build a house, and subsequent events put it out of his power to pay for it, it is commendable for him to stop the work and pay for what has been done and the damages sustained by the contractor. He may be under a necessity to change his residence, but upon the rule contended for, he would be obliged to have a house which he did not need and could not use. In all such cases the just claims of the party employed are satisfied, when he is fully recompensed for his part performance and indemnity for his loss in respect to the part left unexecuted.”²¹

²¹ *Clark v. Marsiglia*, 1 Denio. 317, 43 Am. Dec. 670; *Davis v. Bronson*, 3 N. D. 300, 50 N. W. 836; *Lord v. Thomas*, 64 N. Y. 119; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Peck v. Kansas City Co.*, 96 Mo. (App.) 212, 70 S. W. 169.

2. *By Impossibility.*§ 461. *Breach by Impossibility Created by Party.*

When one of the parties, before the time for performance arrives, makes it impossible that he shall perform his promise, the other party may treat his promise as discharged or bring an action for damages.¹

In a recent case a professional boxer was to receive a certain sum provided he boxed ten rounds against a certain opponent. In the second round the contest came to an end through his disabling his opponent by a foul blow. It was held that he could not recover, as his act had made performance impossible.²

The right to bring the action at once without waiting for the time agreed upon for performance was sustained where A agreed with B to execute a lease to him on a future day, and before the day executed a lease to C;³ where a man promised to marry a woman on a future day and before the day married another woman;⁴ and where a person employed an attorney to defend him against a criminal prosecution, and gave him his note for his fee, but committed suicide before the trial.⁵ So, where one is bound to perform on demand, no demand of performance is necessary where he has incapacitated himself from performing the contract.⁶

¹ 9 Cyc. 639; 13 C. J. 647; *Heyward v. Goldsmith*, 269 Fed. 946.

² *Moha v. Hudson Boxing Club*, 160 N. W. 266 (Wis.).

³ *Lovelock v. Franklyn*, 8 Q. B. 371; *Ford v. Tilley*, 6 B. & C. 325; *Ogdens Co. v. Nelson*, A. C. (1905) 109. But see *Garbrinio v. Roberts*, 41 Pac. Rep. 857 (Cal.).

⁴ *Short v. Stone*, 8 Q. B. 358, *King v. Kersey*, 2 Ind. 402; *Sheahan v. Barry*, 27 Mich. 217.

⁵ *Mitcherson v. Dozier*, 7 J. J. Marsh. 53, 22 Am. Dec. 116.

⁶ *Smith v. Jordan*, 13 Minn. 264, 97 Am. Dec. 232; *Delamator v. Miller*, 1 Cow. 75, 13 Am. Dec. 512; *Bassett v. Bassett*, 55 Me. 127; *Boyle v. Guysinger*, 12 Ind. 273.

(b)

DISCHARGE IN COURSE OF PERFORMANCE.

1. *By Renunciation.*§ 462. *Breach by Renunciation in Course of Performance.*

Where in the course of the performance one of the parties refuses performance of his part the other may treat the renunciation as a discharge from further performance, and bring an action, although such performance would otherwise be a condition precedent to the liability of the promisor.¹ Thus, where a contract was made for the manufacture and supply of goods of a specified kind, to be delivered in certain quantities monthly, and the buyer after accepting a portion of the goods gave notice to the seller that he had no occasion for more and would not accept or pay for them, it was held that the seller might claim for breach of contract without manufacturing or tendering the rest of the goods.²

2. *By Impossibility.*§ 463. *Breach by Impossibility Created by Party.*

In like manner, where one party has by his own act made the contract incapable of full performance, the other may treat such act as a discharge from further performance and

¹ Trammell v. Vaughan, 158 Mo. 226, 59 S. W. Rep. 83; Dugan v. Anderson, 36 Md. 567; Parker v. Russell, 133 Mass. 74; Collins v. De La Porte, 115 Mass. 162; Smith v. Lewis, 24 Conn. 624; Davis v. Crawford, 2 Mill. (S. C.) 401, 12 Am. Dec. 682; Rankin v. Darnell, 11 B. Mon. 30, 52 Am. Dec. 557; Brigham v. Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Fallon v. Lawler, 102 N. Y. 228; McCormick v. Basall, 46 Iowa, 235; James v. Adams, 16 W. Va. 245.

² Cort v. Ambergate R. Co., 17 Q. B. 127; Black River Lumber Co. v. Warner, 93 Mo. 374; Hale v. Trout, 35 Cal. 229. He may waive his action for damages and sue for the value of work done and materials furnished. Ehrlich v. Ins. Co., 88 Mo. 249.

claim compensation for the part he has performed or the damages he has sustained.¹ This rule has been applied where a publisher engaged an author to write a treatise for a periodical, and before he had completed it abandoned the publication of the periodical;² where a lime-burner contracted with the receiver of a railroad to remove the ashes for a year from an ash-pit, for the cinders and coals to be found there, and before the expiration of the year the superintendent terminated the contract on the ground of the jealousy of other lime-burners;³ where A agreed to sell to B, at a stipulated price per ton, all the ice on a pond, and A permitted another party to remove a portion of it;⁴ where by a contract between an attorney and his client, the former agreed to defend the latter on a charge of grand larceny for five hundred dollars, but after part of the service was rendered, the client fled from justice;⁵ where on a contract for the whole product of a dairy for the year, the seller delivered a part, and then informed the purchaser that he had sold the product for the rest of the year to another, and had delivered part thereof.⁶

¹ See cases ante, § 461; and *Chicago v. Tilley*, 103 U. S. 146; *Lovell v. Ins. Co.*, 111 U. S. 264; *Woolner v. Hill*, 93 N. Y. 581; *Rankin v. Darnell*, 11 B. Mon. 30, 52 Am. Dec. 557; *Gibson v. Whip Pub. Co.*, 28 Mo. (App.) 451; *Woodberry v. Warner*, 53 Ark. 488; *O'Neil v. Armstrong*, 2 Q. B. 418 (1895); *Fitts v. Remhart*, 102 Ia. 311.

² *Planche v. Colburn*, 8 Bing. 14; *Balmer v. Oil Corp. (Tex. Civ. A.)*, 241 S. W. 519.

³ *Kerr v. Little*, 42 N. J. (Eq.) 528.

⁴ *Murphy v. St. Louis*, 8 Mo. App. 483.

⁵ *Bright v. Taylor*, 4 Sneed, 159.

⁶ *Crist v. Armour*, 34 Barb. 376.

CHAPTER XVII.

DISCHARGE BY BREACH (Continued).

Section 464. Introductory—Discharge by Failure to Perform.

I.

INDEPENDENT PROMISES.

465. Three Classes of Independent Promises.

(A) ABSOLUTE PROMISES.

466. Where Promise Absolute Performance of Consideration not Required.

467. Independent Promises not Favored; Concurrent Promises.

(B) DIVISIBLE PROMISES.

468. Failure to Perform Part of Divisible Promises.

469. Alternative Promises.

(C) SUBSIDIARY PROMISES.

470. Subsidiary Promises Explained and Illustrated.

II.

CONDITIONAL PROMISES.

471. The Different Kinds of Conditional Promises.

472. Suspensory and Dependent Conditions Distinguished.

473. Dependent Conditions Precedent Must be Performed or Promise Discharged.

474. Condition and Warranty Distinguished.

475. Waiver of Conditions.

§ 464. *Introductory—Discharge by Failure to Perform.*

In the two cases of discharge dealt with in the last chapter, one of the parties (say B) has in word or act so dealt with

the contract as to intimate to the other (say A), that a further performance on his part is needless, and the courts have decided that A is not bound to tender a performance which he well knows that B will not or cannot accept. But where the breach of contract by B does not make the contract wholly incapable of performance, or is not accompanied by any overt expression of intention to abandon his rights, the question is whether A is thereby discharged or whether he merely acquires a right of action from the breach. This can be answered only by examining the terms of the contract, and endeavoring to ascertain the intention of the parties,¹ as to whether the promises were *independent of or conditional upon one another*.

I.

INDEPENDENT PROMISES.

§ 465. *Three Classes of Independent Promises.*

The promise may be *independent* in three ways, viz., by being (a) absolute (b) divisible or (c) subsidiary.

(a) Where A's promise to B is *absolute*, *i. e.*, where it is wholly unconditional upon the performance by B of his promise to A, a failure of performance by B would not discharge A, but would only furnish ground for an action against B.

(b) Where the promise is *divisible*, *i. e.*, where it is susceptible of more or less complete performance, and the damage sustained by an incomplete performance or partial breach may be apportioned according to the extent of failure, the promise is in fact regarded as a number of promises to do a number of similar acts, and a breach of one or some of these does not discharge the promisee.

¹ Driver v. Salt Lake Co., 22 Utah 143, 61 Pac. Rep. 734; Moore v. Bennet, 40 Cal. 251; Phila., etc., R. Co. v. Howard, 13 How 339; Lawber v. Bargs, 2 Wall. 736; Stavers v. Curling, 3 Bing. N. C. 355

(c) Where the promise is *subsidiary, i. e.*, where the breach by one of the parties is a breach of a term of the contract only, and of a term which the parties have not, upon a reasonable construction of the contract, regarded as vital to its existence, the same result follows. The injured party is bound to continue his performance of the contract, but may bring an action to recover such damages as he has sustained by the default of the other.

(a)

ABSOLUTE PROMISES.

§ 466. *Where Promise Absolute, Performance Not Required.*

A person may make an absolute promise to perform, in such a manner that it will be no answer to an action for not performing that the other party has not performed his side of the agreement. Thus, if A makes a promise to B in consideration of a promise made by B to A, and A has not, in express terms, or upon a reasonable construction of the contract, made the performance of his promise depend upon the performance of B's promise, a breach of his promise by B will not discharge A. The reason is that he has agreed to do something in consideration of B *promising* to perform something and not in consideration of B *actually performing* the thing.¹

It may be laid down generally that if there is no connection in the matter of the promises, and the performance on

¹ Dey v. Dox, 9 Wend. 129, 24 Am. Dec. 137; Gould v. Banks, 8 Wend. 562, 24 Am. Dec. 90; Int. Text Book Co. v. Martin, 221 Mass. 1; Hamilton v. Ins. Co., 13 How. 307; Clough v. Baker, 48 N. H. 254; Larimore v. Tyler, 88 Mo. 661.

the one side is quite independent of the performance on the other, the promises are independent.² Where by the terms of the contract the time to perform the covenant on the one side is to happen, or may happen, before the time for the performance of the covenant on the other side, the former is not dependent on the latter.³ Suppose that in January, 1892, A agrees to purchase land of B and covenants to pay a sum of money on the 1st of April, 1892. B covenants in turn to convey the lands to A, but no day is fixed for the execution of the conveyance. So soon as the 1st of April is passed, B can sue A for the money, and it is no answer to his claim that he has never conveyed, or offered to convey the land to A.⁴ So promises are independent, where on the one hand a chattel is sold and agreed to be delivered on demand, and on the other payment is deferred until five months after the date of the agreement.⁵

§ 467. *Independent Promises Not Favored—Concurrent Promises.*

“The whole doctrine of implied dependency of mutual covenants and promises is a modern one. Indeed, not a trace of it is to be found prior to the time of Lord Mansfield. In early times the question could arise only with reference to mutual covenants, as mutual promises were not binding in law. As to mutual covenants it was well settled from an early period that they were to be deemed separate contracts and wholly independent of each other, unless one of them

² Cases cited in last note; *Ware v. Chappell*, Style 686; *Rector v. Purdy*, 1 Mo. 186, 13 Am. Dec. 494; *Strohmeyer v. Zeppenfeld*, 28 Mo. (App.) 268; *Butler v. Manny*, 52 Mo. 268; *Hamilton v. Ins. Co.*, 137 U. S. 370; *American Boiler Co. v. Fouthem*, 50 N. Y. (Supp.) 351; *Northrup v. Northrup*, 6 Cow. 296.

³ *Matlock v. Kinglake*, 10 A. & E. 50; *Front Street R. Co. v. Butler*, 50 Cal. 574; *Sayre v. Craig*, 4 Ark. 10, 37 Am. Dec. 757; *Bowen v. Bailey*, 42 Miss. 405, 2 Am. Rep. 601; *Clough v. Baker*, 48 N. H. 254; *Loud v. Pomona Co.*, 153 U. S. 564; *O'Neill v. Webb*, 78 Mo. (App.) 6; *Sheeren v. Moses*, 84 Ill. 448.

⁴ *Matlock v. Kinglake*, *supra*.

⁵ *Dox v. Dey*, 3 Wend, 356.

was made expressly dependent on the other. . . . As to mutual promises, it was no sooner decided that such promises were a sufficient consideration for each other, than it was held to follow as a consequence that they were independent of each other. . . . The case of *Martindale v. Fisher* (1 Wils. 88), shows that the old rule was regarded as still in full force as late as 1745. Lord Mansfield in *Kingston v. Preston* (1773, cited in *Jones v. Barkley*, Dougl. 684), held that performance by the plaintiff was a condition precedent to performance by the defendant, *i. e.*, that the defendant's covenant was dependent upon the plaintiff's by implication. Lord Mansfield did not intimate that he was deciding contrary to what had been held for law from time immemorial, but such was the fact. The decision has been uniformly acquiesced in, however, from that day to this, and hence in effect it overruled a long line of decisions, and established the doctrine of general dependency by implication as it exists at the present day. . . . In *Rawson v. Johnson* (1 East. 203, 1801), mutual promises for the purchase and sale of goods were held to be mutually dependent, though each promise was absolute in terms, and no time was appointed for the performance of either. With this case, therefore, the doctrine of mutual dependency was completely established as it has ever since remained."¹

Modern courts do not favor independent promises, and the later cases² show that they will not construe promises to be independent of one another, where they form the whole consideration for one another, or it appears that they are to be performed by each party at the same time, unless the intention of the parties to the contrary be very clear, but a failure to perform one promise will exonerate the other party from performance on his part.³ Where money is to be paid for something done or delivered, it will not be presumed that the intention of the parties was that the money was to be

¹ Langdell Contr. 177.

² "The older cases," says Grose, J., in *Glazebrook v. Woodrow*, 8 T. R., "lean to construe covenants of this sort to be independent, contrary to the real sense of the parties and the true justice of the case."

³ 9 Cyc. 642; 13 C. J. 568; *Rigsby v. Bank* (Tex.), 241 S. W. 207.

paid or the thing done or the goods delivered without performance on the other side.⁴

Thus, in agreements for the sale of goods the obligation of the seller to deliver and that of the buyer to pay are concurrent conditions in the nature of mutual conditions precedent, and neither can enforce the agreement against the other without showing performance or readiness and willingness to perform his own promise.⁵ So in contracts for service the performance of the service is a condition precedent, and the employe is not entitled to payment without rendering or offering to render the agreed service.⁶ So in contracts for the sale of land, the conveyance of the estate and the payment of the purchase-money are, in general, concurrent acts and dependent promises, whether a particular day be appointed for completion or not; and readiness and willingness to complete on either side is a condition precedent to liability on the other.⁷

“When, in the order of events, the act to be done by the one party must necessarily be done before the other can be done, it is necessarily a condition precedent, although there be a stipulation for liquidation damages for the breach on each side, and although there be a fixed future time for payment sufficiently distant to have the work done in the meantime. Suppose B agrees to build, at his own shop, a carriage for A, of A's materials; A stipulates seasonably to furnish materials, and to pay B in four months; and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials by A is a condition precedent.

⁴ *King Phillip Mills v. Slater*, 12 R. I. 88.

⁵ *Bloxam v. Sanders*, 4 B. & C. 941; *Bank v. Hagner*, 1 Pet. 455; *Sargent v. Adams*, 3 Gray, 72, 63 Am. Dec. 718; *Grandy v. McCleese*, 2 Jones, 142, 64 Am. Dec. 574; *Dunham v. Pettee*, 8 N. Y. 508; *Clarke v. Weis*, 87 Ill. 438, 29 Am. Rep. 60.

⁶ *McMillan v. Vanderlip*, 12 Johns. 165; *Olmstead v. Beale*, 19 Pick. 528; *Hansell v. Erickson*, 28 Ill. 257.

⁷ *Laird v. Pim*, 7 M. & W. 474; *Manby v. Cremonini*, 6 Ex. 808; *Runkle v. Johnson*, 30 Ill. 328, 83 Am. Dec. 191; *Frey v. Johnson*, 22 How. Pr. 316; *Emery v. Wightman* 167 N. Y. 107; *Hill v. Grigsby*, 35 Cal. 656.

Without it B cannot perform. He must build it of A's materials. Even building it of his own would not be a performance. B has his shop, his tools, and his workmen all ready, but A does not furnish the materials. If B sues A averring readiness to perform, he may recover. But if A sues B for not building the carriage, it would be a good answer that A himself had not furnished the materials, because whatever else the contract may contain, this is in its nature a condition precedent."⁸

(b)

DIVISIBLE PROMISES.

§ 468. *Failure to Perform Part of Divisible Promises.*

Where the promises are divisible a failure of a party to perform them all does not discharge the other from his obligation. A contract for sales from time to time of goods manufactured by the seller is as to the successive sales, divisible, and each a contract by itself.¹ In *Simpson v. Crippen*,² A agreed with B to supply him with a given quantity of coal to be delivered in equal monthly installments for twelve months. B agreed to send wagons to receive the coal. B did not during the first month send wagons enough to receive one-twelfth of the coal. A rescinded the contract. It was held that he was not entitled to do so, inasmuch as B was willing to continue the contract as to the remaining installments, and it did not appear to have been the intention of the parties to determine the contract upon the failure of one of the parties to fulfill one of a series of terms. The principle of this case has been followed in a number of cases

⁸ *Cadwell v. Blake*, 6 Gray. 402; *Loveland v. Warner*, 204 P. 622.

¹ *Mark v. Stuart Howland Co.*, 226 Mass. 35, 115 N. E. 42.

² *L. R. 8 Q. B. 14.*

in England and in a few in the United States.³ On the other hand in *Hare v. Rennie*,⁴ the defendant had bought of plaintiffs a large quantity of iron, to be shipped in the months of June, July, August, and September in about equal portions each month, and plaintiffs shipped only a small portion in June, not being nearly the portion stipulated for in that month. It was held that defendant was not bound to accept the smaller quantity, nor any subsequent tender, as plaintiffs had substantially failed to perform their part of the contract, which formed a condition precedent to the liability of the defendant. The rule of this case, in commercial contracts at least, is approved by the Supreme Court of the United States and by the weight of American authority.⁵

But the right of rescission may be exercised on failure to perform a part or installment of the contract:

First. Where by the express terms of the agreement, performance of each stipulation is made a condition precedent to its continuing obligation.

Second. It is laid down in a number of cases that whether a contract is entire or divisible depends not upon the singleness of the subject or the multiplicity of the items composing it, but upon the entireness of the consideration; that if the consideration is single the contract is entire, whatever the number and variety of the items embraced, but if the consideration is apportioned, to each of the items, the contract

³ *Mersey Steel Co. v. Naylor*, 9 App. Cas. 434; *Freeth v. Burr*, L. R. 9 C. P. 208; *Trotter v. Heckscher*, 40 N. J. (Eq.) 656; *Blackburn v. Reilly*, 47 N. J. (L.) 308; *Gerli v. Silk Manfg. Co.*, 31 Atl. Rep. 401; *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Cohen v. Platt*, 69 N. Y. 348. So where on a sale of goods the price is payable in installments, a failure to pay one installment at the agreed time does not discharge the whole contract, but the buyer, by tendering the future installments, may obtain the benefit of the sale. *Tiedeman Sales* § 210.

⁴ 5 H. & N. 19.

⁵ *Norrington v. Wright*, 115 U. S. 188; *King Philip Mills Co. v. Slater*, 12 R. I. 82; *Pope v. Porter*, 102 N. Y. 366; *Bance v. Earle*, 143 Mass. 1; *Rugg v. Morris*, 110 Pa. St. 236; *Clark v. Wheeling Steel Works*, 53 Fed. Rep. 494.

is divisible. But a better test is the nature of the contract itself. If it is one bargain, it is entire whether there be one article or many. If the seller was unwilling to sell one portion without selling the whole and the buyer unwilling to take a part unless he could have the whole, then it is an entire and not a divisible contract.⁶

“The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails shipped from a European port, or ports, for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron. . . . The seller is bound to deliver the quantity stipulated and has no right either to compel the buyer to accept a less quantity or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.”

In *Norrington v. Wright*⁷ it is said:

Therefore where it is evident from the nature and circumstances of the case, that the regular performance of each stipulation was an inducement to the contract, and so goes to the root of the matter as to make its performance a condition of the obligation to proceed in the contract⁸ it is entire and not divisible.

Third. Where the party in default expressly announces or his conduct is such as to evince an intention to abandon

⁶ See note to *Stearns Salt Co. v. Dennis Lumber Co.*, Q., 188 Mich. 700, 154 N. W. 91, in 2 A. L. R. 643.

⁷ 115 U. S. 188.

⁸ *Wilson v. Owens*, 1 Ind. Ter. 163, 38 S. W. Rep. 978; *Norrington v. Wright*, supra; *Tyson v. Doe*, 15 Vt. 571; *Catlin v. Tobias*, 26 N. Y. 221; *Jenness v. Shaw*, 35 Mich. 20.

the contract or a design no longer to be bound by its terms.⁹ Refusing to pay at the time called for falls under this exception.¹⁰

§ 469. *Alternative Promises.*

Where promises are in the alternative, *i. e.*, where the promisor agrees to perform one of two or more different acts, he has a right to elect which one of the alternative promises he will perform;¹ unless the election is expressly given to the promisee.² An election once made is final and irrevocable,³ and if the promisor has a right to do one of two things by a given day, his right of election is lost if that day passes without his electing.⁴ A promise to pay a certain amount of money on a given day, with a stipulation following that it may be discharged in some other commodity, becomes an absolute promise to pay money, if that other commodity is not paid on the day.⁵

⁹ *Curtis v. Gibney*, 59 Md. 131; *Bradley v. King*, 44 Ill. 339; *Fletcher v. Cole*, 23 Vt. 114; *Blackburn v. Reilly*, 47 N. J. (L.) 308; *Stephenson v. Cady*, 117 Mass. 6; *Reybold v. Voorhees*, 30 Pa. St. 116; *Branch v. Palmer*, 65 Ga. 210; *Robson v. Bohn*, 27 Minn. 333.

¹⁰ *Id.*

¹ *Metz v. Albrecht*, 52 Ill. 491; *Norris v. Harris*, 15 Cal. 226; *Mayer v. Dwinell*, 29 Vt. 298; *Smith v. Sanborn*, 11 Johns. 59; *Choice v. Moseley*, 1 Bail. 136, 19 Am. Dec. 661.

² *Norris v. Harris*, 15 Cal. 226. If the promisee have the election, he must generally give notice of his election to the promisor before he can charge him. *Center v. Center*, 38 N. H. 318.

³ *Brown v. Ins. Co.*, 1 El. & E. 853; *Gath v. Lees*, 3 Hurl. & Co. 558.

⁴ *Choice v. Moseley*, 1 Bail. 136, 19 Am. Dec. 661; *Roberts v. Beatty*, 2 Penr. & W. 63, 21 Am. Dec. 410.

⁵ *Oriental Hotel Co. v. Griffiths*, 88 Tex. 574, 33 S. W. Rep. 658; *Baker v. Todd*, 6 Tex. 273, 55 Am. Dec. 775; *Plummer v. Keaton*, 9 Yerg. 27; *Kalkman v. Bayles*, 17 Cal. 291.

(c)

SUBSIDIARY PROMISES.

§ 470. *Subsidiary Promises Explained and Illustrated.*

Where in one contract there are several promises, and it appears that the non-performance of one of them does not materially affect or frustrate its main object, then this partial failure will not act as a breach, but the other party will have his action for any damage he may have sustained from the failure.¹

In *Bettini v. Gye*,² the plaintiff, a professional singer, entered into a contract with the defendant, director of the Royal Italian Opera in London, for the exclusive use of his services as a singer in concerts and operas for a considerable time and upon a number of terms, one of which was as follows: “(7) Mr. Bettini agrees to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals.” The plaintiff broke this term by arriving only two days before the commencement of the engagement, and the defendant treated this as a discharge. But the court thought that this stipulation did not so go to the root of the matter as to render the performance of the rest of the contract by the plaintiff a thing different in substance from what the contract stipulated for, but it merely affected it in a way which could be compensated for in damages. Therefore it did not authorize the other party to abandon the contract.³

A stipulation by the seller of goods that the buyer shall have the exclusive right to sell such articles in a prescribed territory is not so of the essence of the contract as to pre-

¹ Weintz v. Hafner, 78 Ill. 27.

² 1 Q. B. Div. 183.

³ Another illustration of a subsidiary promise is to be found in a warranty on a sale of goods. See post, § 474.

clude the seller on its breach from recovering the contract price.⁴

On the other hand a promise is not subsidiary where it goes to the root of the contract, so that a failure therein would frustrate the main object of the contract. Where a singer was engaged for a season to take the principal part in a new opera, it was held that her failure to perform on the opening and the three next succeeding nights, went to the root of the contract and discharged the other party.⁵ And, in general, where the failure to perform is in respect to matters which would render the performance of the residue a thing different in substance from what was contracted for, the party not in default may abandon the contract.⁶

II.

CONDITIONAL PROMISES.

§ 471. *The Different Kinds of Conditional Promises.*

Where a person (say A) makes a promise to another (say B) which is not an absolute promise but subject to some condition, that condition is, as regards time, either (a) *subsequent*, (b) *concurrent* or (c) *precedent*.

(a) In the case of a *condition subsequent*, the rights of B under A's promise are determinable upon a specified event. The condition does not affect the commencement of B's rights, but its occurrence brings them to a conclusion. We have already dealt with conditions of this nature in speaking of the discharge of contract by agreement.¹

⁴ Tichnor v. Evans, 102 Atl. 1031 (Vt.); Springfield Seed Co. v. Walt, 94 Mo. App. 76. See Freet v. Am. El. Co., 257 Ill. 248, 100 N. E. 933; Bride v. Riffe, 93 Neb. 359, 140 N. E. 639.

⁵ Poussard v. Spiers, 1 Q. B. D. 410.

⁶ Leopold v. Salkey, 89 Ill. 412; Campbell Printing Press Co. v. Marsh, 36 Pac. Rep. 79 (Colo.).

¹ See ante, § 424.

(b) In the case of a *condition concurrent*, the rights of B under A's promise are dependent upon his doing, or being prepared to do, something simultaneously with the performance of his promise by A. We have likewise already treated of this class of conditions.²

(c) In the case of a *condition precedent*, the rights of B under A's promise do not arise until something has been done, or has happened or some period of time has elapsed.

§ 472. *Suspensory and Dependent Conditions Distinguished.*

There are certain conditions which we have already met¹ which suspend the right to call for performance, as, for example, a condition that performance is not to be due until the happening of a future event, or until the doing of some act by some third person, or until a demand or notice of some kind is given. These we shall call *suspensory* conditions, and are to be distinguished from what we are considering here, and which we shall call *dependent* conditions, *i. e.*, conditions which effect a discharge of contract by their breach, if not performed at a fixed time or within a reasonable time from the making of the contract.

§ 473. *Dependent Conditions Precedent Must Be Performed or Promise Discharged.*

A condition precedent of this character is defined as a promise, the untruth or non-performance of which discharges the contract.¹ If the obligation of one promise is expressly or impliedly conditional upon the due performance of the other, then the performance of the promise constituting the

² See ante, § 467; Independent Promises not Favored—Concurrent Promises.

¹ See ante, § 424.

¹ Anson Contr. 303.

executory consideration is a condition precedent to the liability to perform the other promise.² Therefore, where A has expressly or impliedly agreed to do a certain thing on condition that B previously does some other thing, if B does not do as he agreed A is discharged.³ But the promise of B, as we have seen,⁴ must be in regard to some matter which the parties to the contract have expressly stated shall be vital to its existence, or which upon a reasonable construction of the contract they may be deemed to have considered as vital.

§ 474. *Condition and Warranty Distinguished.*

A warranty is a promise of indemnity against a failure to perform a term in the contract; it is an express or implied statement of something which the party undertakes shall be part of the contract; and though part of the contract, collateral to the express object of it. Therefore, the breach of a term which amounts to a warranty will *give a right of action*, but it will not, like the breach of a condition, *take away existing liabilities*; for it is a mere promise to indemnify.¹

Much confusion has resulted from the courts having failed very often to distinguish between a warranty and a condition.² A warranty is express when the seller actually assures the buyer of the existence or non-existence of a fact and implied when the law deduces or infers that assurance from the

² Leake Contr. 648; Oakley v. Morton, 11 N. Y. 25, 62 Am. Dec. 49; Roberts v. Opdyke, 40 N. Y. 264; Bersch v. Sander, 37 Mo. 104; Dermott v. Jones, 2 Wall. 1; Husted v. Craig, 36 N. Y. 221; Larimore v. Tyler, 88 Mo. 666.

³ Cases in last note.

⁴ Ante, § 468.

¹ Anson Contr. 305; Chanter v. Hopkins, 4 M. & W. 404; Asadorian v. Sayman (Mo.), 233 S. W. 467.

² See remarks of Abinger, C. B., in Chanter v. Hopkins, 4 M. & W. 379; and of Martin, B., in Azemar v. Casella, L. R. 2 C. P. 677.

execution of the contract of sale.³ Examples of implied warranties upon the sale of goods have been already given in a former chapter.⁴

It follows that there is no right in the buyer of goods to rescind the contract because of a breach of warranty—otherwise the obligation of a warranty would not differ from the effect of a condition precedent—but his remedy is an action for damages.⁵ But it is said by an author on the law of Sales,⁶ that in the majority of the American States, for the purpose of avoiding circuity of action as it is claimed, the buyer may even after acceptance of the goods bring his action for breach of warranty, rescind the contract of sale and return the goods, in place of bringing his action for damages.⁷

³ *Borrekins v. Bevan*, 3 Rawle 23; *Otts v. Alderson*, 10 S. & M. 476; *Terhune v. Dever*, 36 Ga. 648; *Neave v. Arntz*, 6 Wis. 174.

⁴ *Ante*, Chap. II.

⁵ *Voorhees v. Earl*, 2 Hill, 288; *Muller v. Eno*, 14 N. Y. 597; *Hoover v. Sidener*, 98 Ind. 290; *Wright v. Davenport*, 44 Tex. 164; *Brigg v. Hilton*, 99 N. Y. 517; *Bunce v. Beck*, 43 Mo. 279; *Lyon v. Bertram*, 20 How. 149. In *Brigg v. Hilton*, 99 N. Y. 529, it is said: "If the sale is of existing and specific goods, with or without warranty of quality, the title at once passes to the purchaser, and where there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot for that reason either refuse to accept the goods or return them. If the contract is executory, and the goods yet to be manufactured, no title can pass until delivery or some equivalent act to which both parties assent; and when offered, the vendee may reject the goods as not answering the bargain, but if the sale was with warranty, he may receive the goods, and then the same consequences attach as in the former cases, and among others, the right to compensation if the warranty is broken." The purchaser is not bound to rescind, he may use the goods and bring his action on the warranty. *Brigg v. Hilton*, 95 N. Y. 517, 52 Am. Rep. 63.

⁶ *Tiedeman Sales*, § 197.

⁷ *Door v. Fisher*, 1 Cush. 271; *Morse v. Brackett*, 98 Mass. 209; *Marshall v. Perry*, 67 Me. 78; *Ralph v. Chicago, etc., Co.*, 32 Wis. 177; *Jack v. R. Co.*, 53 Iowa 399; *Warder v. Fisher*, 48 Wis. 338; *Ruff v. Jarrett*, 94 Ill. 475; *Byers v. Chapin*, 28 Ohio St. 306; *Bldg. Co. v. Callan*, 193 N. Y. S. 504.

§ 475. *Waiver of Conditions.*

The performance of a condition may be waived by the party who has a right to enforce it, who will be precluded from relying upon the performance of the residue as a condition precedent to his liability; but must perform the contract on his part, and rely upon his claim for damages in respect of the defective performance.¹ Where one of the parties to a contract is bound to do certain work within a certain time, and fails to complete it within the time, and the other urges him to go on, this is a waiver of performance as to time, and a recovery may be had on the basis of the amount and value of the work done, reckoned at the contract price, deducting damages for the delay.²

Waiver may be express or implied, but the acts or circumstances relied on to constitute it must have transpired after the party against whom the waiver is urged knew, or should have known, the facts constituting the breach.³ The act or words must show an intention to waive the right of enforcing the condition.⁴ And although mere delay or negligence in the enforcement of the condition does not, in itself, amount to a waiver,⁵ it is a fact from which, if not explained by facts which make the delay reasonable or inevitable,⁶ waiver may

¹ *Ellen v. Topp*, 6 Ex. 441; *Graves v. Legg*, 9 Ex. 717, 23 L. J. Ex. 231, *Smith v. Alker*, 102 N. Y. 87; *Murray v. Farthing*, 6 Mo. 251; *Ohio Car. Co. v. Menzies*, 90 Ind. 83, 46 Am. Rep. 195; *Rigsby v. Bank (Tex.)*, 241 S. W. 207.

² *Phillips v. Seymour*, 91 U. S. 646; *Eyster v. Parrott*, 83 Ill. 517.

³ *Dodge v. Minn., etc., Roofing Co.*, 14 Minn. 49. Payment or part payment for work done is not, of itself, and without regard to the circumstances under which it was made, conclusive evidence of a waiver of claims for defects in the work; *Moulton v. McOwen*, 103 Mass. 587; *Morrison v. Cummings*, 26 Vt. 486.

⁴ *Fishback v. Van Dusen*, 33 Minn. 117; *Fuller v. Bean*, 32 N. H. 290; *Hammett v. Linnemann*, 48 N. Y. 399.

⁵ *Fishback v. Van Dusen*, 33 Minn. 117; *Farlow v. Ellis*, 15 Gray 229.

⁶ *Stone v. Perry*, 16 Me. 48; *Whitney v. Eaton*, 14 Gray, 225; *Goldsmith v. Bryant*, 26 Wis. 34; *Scudder v. Bradbury*, 106 Mass. 422.

be inferred.⁷ A mental determination to waive the performance of the condition will not, if uncommunicated by act or words, constitute a waiver.⁸

⁷ *Smith v. Dennis*, 6 Pick. 262; *Hutchings v. Munger*, 41 N. Y. 155; *Fishback v. Van Dusen*, 33 Minn. 111; *Goldsmith v. Bryant*, 26 Wis. 54.

⁸ *Maxwell v. Briggs*, 17 Vt. 176.

PART V.

THE REMEDIES UPON THE CONTRACT.

Section 475a. The Right to Break a Contract.

476. The Remedies for Breach of a Contract.

§ 475a. *The Right to Break a Contract.*

Has one a lawful right to break his contract? Some writers say yes, regarding the making of an agreement as the taking of a risk, with the privilege of performing or paying damages. But it would seem that just because a man has the power to commit murder this does not make it lawful, for him to abstain from killing or to do so and pay the penalty, so as a man's contracts are made with the expectation that they are to be performed he has no legal right to break them. If he has, why do courts decree specific performance of certain agreements and where he has promised not to do a thing enjoin him from doing it. And as we shall see in the early law, a breach of contract was regarded as a tort.¹ And when it is held that to charge a man with not keeping his agreements is defamatory and actionable, it surely means that he is charged with something he has no legal right to do.²

In an Alabama case³ it is said:

“He had no *right* to violate that contract, and compensate the injured party in damages. It is true, the law would not interpose to compel the performance of the contract; but this is not because he had a right to violate his contract, but because the law supposes the injury done by the violation of it can be sufficiently compensated in damages. A man may commit a trespass, for which the law would merely give an

¹ Post 96a, *History of Consideration*.

² See *Spence v. Johnson*, 142 Ga. 267, 82 S. E. 646; *Hays v. Mather*, 15 Ill. App. 30; *Kee v. Armstrong*, 182 Pac. 494 (Okla.); *Turner v. Brien*, 167 N. W. 584 (Ia.); *Putnal v. Inman*, 80 South. 316 (Fla.).

³ *Johnson v. Sellers*, 33 Ala. 265.

action to recover damages; but it does not therefore follow, that he had a right to commit the trespass, being responsible for the damages, or that a promise made to induce him either to commit or not to commit it would be valid.”

§ 476. *The Remedies for Breach of a Contract.*

For all the rights invaded and all the wrongs suffered in and about the contract and during the period of the contractual relation, Remedies are given by the law to the party injured. These remedies are of various kinds, and they may relate to or grow out of the making of the contract, or they may relate to and grow out of the breach of the contract. The former have been treated in several of the preceding chapters, while the latter will be discussed in the next succeeding chapters.

The remedies open to a person who is injured by the breach of a contract made with him, are of two kinds: he may seek to obtain *damages* for the loss he has sustained; or he may seek to obtain *specific performance* of the contract which the other party has refused or neglected to perform.¹

¹ Every breach of contract entitles the injured party to damages, though they be but nominal; but it is only in the case of certain contracts and under certain circumstances that specific performance can be obtained. See post, § 492.

CHAPTER XVIII

DAMAGES.

Section 477. *Introductory.*

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- 479. Measure of Damages—Rules in *Hadley v. Baxendale*.
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§ 477. *Introductory.*

We come now to the question—the contract being broken and an action for damages being brought upon it, and the damages being unliquidated, *i. e.*, unascertained in the terms of the contract itself¹—what is the amount which the plaintiff, if successful, is entitled to recover, *i. e.*, what is, to use the legal term, the *measure of damages*?

§ 478. *Foundation Principle of Damages is Compensation.*

The rule of law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, as if the contract had been performed.¹ In other words *compensation*

¹ See post, § 485.

¹ *Robinson v. Harman*, 1 Ex. 885; *Scott v. Habineck* (Iowa), 189 N. W. 817.

to the injured party is the foundation principle of damages.² Where no loss accrues from the breach, the plaintiff is nevertheless entitled to nominal damages, *i. e.*, "a sum of money that may be spoken of, but that has no existence in point of quantity,"³ or, as called by an old writer, "a mere peg to hang costs on."⁴ On a breach of a promise to pay a certain sum of money, nothing more than the sum due with interest can be recovered, the possible loss to the creditor by being kept out of his money not being allowed to be considered by the jury in assessing damages.

§ 479. *Measure of Damages—Rules in Hadley v. Baxendale.*

The leading case is *Hadley v. Baxendale*.¹ Hadley & Co. were owners of a mill, and the shaft of one of their engines having broken they gave it to defendant, a carrier, to take to an engineer to serve as a pattern for a new one; defendant's clerk being informed that the mill was stopped and that the shaft must be delivered immediately. But through the negligence of defendant the shaft was not delivered promptly and in consequence Hadley & Co. did not get the new shaft until several days later, the mill in the meantime remaining silent and idle. For the loss of the profits which they would have made if the new shaft had come to them when they expected it, Hadley & Co. brought an action and the question was whether the damages were too remote. The court held that if the carrier had been

² Griffin v. Colver, 16 N. Y. 494; Noble v. Ames Manuf. Co., 112 Mass. 497; King v. Gilson, 32 Ill. 348; 83 Am. Dec. 269; Hillebrant v. Brewer, 6 Tex. 45, 55 Am. Dec. 757; Eckel v. Murphey, 15 Pa. St. 488, 53 Am. Dec. 607.

³ Hassard v. Hardison, 114 N. C., 482, 19 S. E. 729; Beaumont v. Greathead, 2 C. B. 491; Fulkerson v. Eads, 19 Mo. (App.) 620; Heichew v. Hamilton, 4 G. Greene, 317; 61 Am. Dec. 122; First Nat. Bk. v. Tel. Co. 30 Ohio. St. 565, 27 Am. Rep. 485.

⁴ See Stanton v. R. Co., 59 Conn. 272, 21 Am. St. Rep. 110.

¹ 9 Ex. 341.

made aware that a loss of profits would result from delay on his part he would have been answerable. But it did not appear that he knew that the want of the shaft was the only thing which was keeping the mill idle, and therefore he could not be liable for the loss of profits. The following rules were laid down for ascertaining the measure of damages in actions for breaches of contract, viz.:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be:

(1) *Such as may fairly and reasonably be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract.*

(2) *Such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach.*

(3) *Such as arose out of the special circumstances under which the contract was made, where such circumstances were communicated by the plaintiff to the defendant.*

(4) *But, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, can only be supposed to have had in his contemplation the amount of injury which would arise generally, not affected by any special circumstances.*

Hadley v. Baxendale, and its principles regarding the measure of damages, have been followed in all the courts of the United States.²

² Damages are said to be either general or special. General damages are the consequence of the breach of contract, or other injurious act, irrespective of any special circumstances; as the loss of money caused by the non-payment of a debt, or the deprivation of goods caused by a failure to deliver under a contract of sale. *Vanderslice v. Newton*, 4 N. Y. 130. Special damages are the further consequence caused by the breach of contract happening under special circumstances, as where a contract is made or goods are ordered for a special purpose, which purpose fails by reason of the default in performance. *Smith v. Sherman*, 4 Cush. 408.

§ 480. *First Rule in Hadley v. Baxendale.*

The first rule in *Hadley v. Baxendale*, requires that the damages shall be the natural result of the breach. This means that the injury must be immediately connected with the breach of contract, and not merely through a series of causes intervening between the immediate consequences of the breach and the damage complained of.¹ Thus, where an opera house was not completed at the time agreed, whereby one of the singers took cold and the lessee lost the anticipated receipts of the performance, it was held that the damage arising from the sickness of the performer was too remote to be the subject of recovery.²

But as the natural result of one breaking his contract is to cause the other to suffer personal trouble and inconvenience³ or to put him to expense in carrying out what the defendant had agreed to do,⁴ damages for these where they naturally flow from the breach of the contract are properly recoverable.

Under this rule the measure of damages where a buyer refuses to accept the goods is the difference between the contract price and the market price at the time they should have been accepted;⁵ in an action against the seller for not delivering, the price being unpaid, it is the difference between the contract price and the market price at the time appointed for delivery. Where the price has been paid, the buyer may

¹ *Jackson v. Adams*, 9 Mass. 484, 6 Am. Dec. 94; *Bond v. Quattlebaum*, 1 McCord, 584, 10 Am. Dec. 702; *Ashe v. De Rossett*, 5 Jones, 299, 72 Am. Dec. 552; *Blanchard v. Ely*, 21 Wend. 342, 34 Am. Dec. 250; *Herring v. Scags*, 62 Ala. 180, 34 Am. Rep. 4; *McGovern v. Lewis*, 56 Pa. St. 231, 94 Am. Dec. 60; *Whitelaw v. Vallance*, 198 P. 449.

² *Academy of Music v. Hackett*, 2 Hilt. 217.

³ *Hobbs v. R. Co.*, L. R. 10 Q. B. 111; *Lord Manners v. Johnson*, L. R. 1 Ch. Div. 673.

⁴ *Barker v. Mann*, 5 Bush, 672, 96 Am. Dec. 373.

⁵ *Rhodes v. Cleveland Rolling Mill Co.*, 17 Fed. 426; *Kadish v. Young*, 108 Ill. 170.

recover the highest market price between the day fixed for delivery and the date of bringing the suit.⁶

A bank impliedly promises a depositor that it will pay his checks to the extent of his funds in its hands. For the dishonor of his check through mistake, in some jurisdictions only the damages actually suffered may be recovered, in others he may recover substantial damages, if he is a trader while in others these damages may be recovered by a non-trader.⁷

§ 481. *Second Rule in Hadley v. Baxendale.*

The damage may also include such matters as both parties, in making the contract, might reasonably expect to be the consequence in the particular case; and in regard to which, they must be taken to have intended to contract.¹ It is often put this way: What would have been in the contemplation of a reasonable man when the contract was made,² although more than one distinguished judge has objected to this test, on the ground that persons when they make a contract, contemplate fulfilling and not breaking it.³

⁶ Ingram v. Rankin, 47 Wis. 406; McKnight v. Dunlop, 5 N. Y. 537; Marsh v. McPherson, 105 U. S. 709; Cannon v. Folsom, 2 Ia. 101; Brashear v. Davidson, 31 Tex. 190; Allen v. Woolf River Co., 169 Wis. 253, 172 N. W. 158. For late delivery the measure is the difference between the market price at the respective dates of due and actual delivery of the goods purchased; but if the purchaser has resold them at a price in excess of that prevailing at the date of delivery, he must in estimating his damages give credit therefor. Wertheim v. Chicoutimi Pulp Co., A. C. 301 (1911).

⁷ See note to McFall v. First Nat. Bk., 211 S. W. 919 (Ark.), in 4 A. L. R. 947.

¹ Goodloe v. Rogers, 9 La. Ann. 275, 61 Am. Dec. 205; Cutting v. R. Co., 13 Allen, 385; Buffalo Barb Wire Co. v. Phillips, 64 Wis. 338; Houston R. Co. v. Hill, 63 Tex. 385; Hammer v. Schoenfelder, 47 Wis. 459; Illinois Central R. Co. v. Cobb, 64 Ill. 128; Fleming v. Beck, 48 Pa. St. 312; True v. International Tel. Co., 60 Me. 9, 11 Am. Rep. 156; Creamery Package Co. v. Creamery Co., 120 Ia. 584; Bank v. Cox, 198 P. 579.

² Anson Contr., § 404, Ogus v. Colliery Co., 1 Q. B. 413 (1899).

³ Prehn v. Royal Bank, L. R. 5 Ex. 100; Leonard v. Tel. Co., 41 N. Y. 544.

Thus, where a landlord agreed in a lease of a farm to repair the fences so as to secure the crop, and failed to do this, and cattle broke in and injured the crops, it was held that he was liable for that damage to the crops, for it was obvious that such damage must have been understood by the parties to be a probable result of a breach.⁴ So where A constructs a hot air furnace in B's house in a negligent manner, A is liable for the loss of the house caused by it igniting from said furnace.⁵

In an English case a cow was sold with a warranty that it was free from disease; it had foot and mouth disease, and infected a number of other cows belonging to A. All the cows died, and the vendor was held responsible for the entire loss, on the ground that he could never have supposed that the cow he sold was intended for a life of solitary confinement. He must have known that the breach of warranty would, in all probability, lead to the result which actually followed.⁶ In another A hired some sacks from B to unload a cargo of peas. While one sack was being hoisted out of the ship it gave way, and a laborer, C, was injured, and brought an action against A and recovered 25*l.* and costs. It was held, that inasmuch as the injuries to C were the natural consequence of B's implied breach of warranty, upon which A was entitled to rely, he could recover against B the 25*l.* damages, the costs he had to pay,⁷ and his own costs.

This rule permits the recovery of anticipated profits where their loss might reasonably be supposed to have been in the contemplation of both parties, at the time of the

⁴ *Culver v. Hill*, 68 Ala. 66, 44 Am. Rep. 134; *Schwan v. Schieffelin*, 31 N. E. Rep. 1025 (N. Y.).

⁵ *Uhlig v. Barnum*, 43 Neb. 584, 61 N. W. Rep. 750; *Snyder v. Stanley* (Ind.), 133 N. E. 512.

⁶ *Smith v. Green*, 1 C. P. D. 92.

⁷ *Vogan v. Oulton*, 79 L. T. 384.

making of the contract, as the result of non-performance,⁸ provided it is the natural and necessary result of the breach⁹ and not a loss arising from other collateral undertakings entered into upon the faith of the promise.¹⁰ But the only profits that can be compensated for are such as are not merely speculative or conjectural but which are capable of being ascertained by the rules of evidence, to a reasonable degree of certainty.¹¹

⁸ *U. S. v. Behan*, 110 U. S. 338; *Boyd v. Meighan*, 48 N. J. L. 404; *Hubbard v. Rowell*, 51 Conn. 423; *Adams Ex. Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382; *Anvil Mining Co. v. Humble*, 153 U. S. 540; *Shoemaker v. Acker*, 48 Pac. 62 (Cal.); *Collins v. Larelle*, 31 Atl. 434 (R. I.).

⁹ *Coweta Falls Manfg. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602; *McKiinnon v. McEwan*, 48 Mich. 106, 42 Am. Rep. 458; *Hoy v. Gro-noble*, 34 Pa. St. 9, 75 Am. Dec. 628; *Simmons v. Brown*, 5 R. I. 299, 73 Am. Dec. 66; *Adams Ex. Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382; *Donnell v. Jones*, 17 Ala. 689, 52 Am. Dec. 194; *Fuller v. Cur-tiss*, 100 Ind. 237, 50 Am. Rep. 786; *Howe Machine Co. v. Bryson*, 44 Ia. 159, 24 Am. Rep. 735; *Mill Co. v. Kennedy*, 234 S. W. 374.

¹⁰ *Masterton v. Mayor*, 7 Hill, 61, 42 Am. Dec. 38; *Wallace v. Ah Sam*, 71 Cal. 197, 60 Am. Rep. 534; *Bridges v. Lanham*, 14 Neb. 369, 45 Am. Rep. 121.

¹¹ *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Muldrew v. Nor-ris*, 2 Cal. 74, 56 Am. Dec. 313; *Wollcott v. Mount*, 36 N. J. (L.) 262, 13 Am. Rep. 438, 38 N. J. (L.) 496, 20 Am. Rep. 425; *Brigham v. Carlisle*, 78 Ala. 243, 56 Am. Rep. 28; *Howe Machine Co. v. Bryson*, 44 Ia. 159, 24 Am. Rep. 735; *Lewis v. Atlas Mut. Ins. Co.*, 61 Mo. 534; *Coos Bay R. Co. v. Nosler*, 48 Pac. 361. These cases exclude the recovery of expected profits, not because they are profits, but because there is no method of ascertaining with certainty the amount which should be allowed. A decision quite at variance with these conclusions is the case of *Wakeman v. Wheeler*, etc., S. M. Co., 101 N. Y. 205, 54 Am. Rep. 676, where it is laid down that profits if they are the natural result of the breach are none the less recoverable because it is difficult to ascertain the amount, but the jury must come as near to a just verdict as the nature of the case admits. But see *Wibberbee v. Meyer*, 50 N. E. 58 (N. Y.). And this seems to be the English rule. Thus in *Simpson v. L. & N. W. R. Co.*, 1 Q. B. Div. 274, a manufacturer was in the habit of sending specimens of his goods for exhibition to agriculture shows, and he made a profit by the practice. He intrusted some such goods to a railway company, who promised the plaintiff, under circumstances which should have brought his object to their notice, to deliver the goods at a certain town on a fixed day. The goods were not delivered at the time fixed, and consequently were late for a show at which they would have been exhibited. It was held that though the ascertainment of damages was difficult and speculative, this difficulty was no

A distinction is made between a new business and one in actual operation. A business already established, and making a profit when the contract is broken can show a previous profit while a new business can only guess at what its profits might have been, and this is too uncertain to satisfy the law.¹²

§ 482. *Third and Fourth Rules in Hadley v. Barendale.*

The third and fourth rules grow out of the second, viz.: that any special loss which might accrue to the plaintiff, but which would not naturally and obviously flow from the breach but for special circumstances in the contract, is not recoverable, unless it be shown that those circumstances were known to the defendant, in which case the law presumes that the consequences of the breach were contemplated. This principle is well stated in a New York case.¹

“Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. . . . A party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it,

reason for not giving any damages at all. As to the liability of a carrier for loss of profits from delay in the delivery of articles intended for use and not for sale—in this case picture films that were passed around a circuit for exhibition—see note to *Chapman v. Fargo*, 223 N. Y. 32, 119 N. E. 76, in L. R. A. 1918 F. 1053. In this case the express company was simply notified to “rush” them. The court held that the measure of damages was the loss of the rental value caused by the delay and incidental expenses, saying: “It was not a sufficient basis for the loss of special profits that the carrier should have been notified of the general purposes for which the films were to be used. There was no notice express or implied that plaintiff owned a theater for which exhibitions of said films on an important holiday like Christmas had been specially advertised.”

¹² *Cramer v. Grand Rapids Co.*, 223 N. Y. 63, 119 N. E. 227, and note 1, A. L. R. 156; *Whitelaw v. Vallance* (Mont.), 198 P. 449.

¹ *Leonard v. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 447.

they had bestowed proper attention upon the subject, and had been fully informed of the facts.”

The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with *reasonably believes that he accepts the contract with the special condition* attached to it.²

§ 483. *Punitive Damages and Injuries to Feelings.*

Damages in an action for breach of contract are always by way of compensation and not of punishment. One can not recover more than such pecuniary loss as he has sustained. Nor can he (as he may in an action of tort) recover for mere disappointment, or injury to the feelings, or vexation of mind, caused by the breach.¹ In an action by a servant for wrongful dismissal his damages “cannot include compensation either for the injured feelings of the servant or for the loss he may sustain from the fact that his having been dismissed, of itself, makes it more difficult for him to obtain fresh employment.”²

To this rule the breach of promise of marriage is an admitted exception, for here the feelings of the person injured are taken into account, apart from such pecuniary loss as can be shown to have arisen.³

² *British Columbia Co. v. Nettleship*, L. R. 3 C. P. 499; *Home v. R. Co.*, L. R. 7 C. P. 583; *Simpson v. R. Co.*, 1 Q. B. D. 274.

¹ *Houston R. Co. v. Shirley*, 54 Tex. 125; *Walsh v. R. Co.*, 42 Wis. 23, 24 Am. Rep. 376.

² *Addis v. Gramophone Co.*, A. C. 488 (1909).

³ *Frost v. Knight*, L. R. 7 Ex. 116; *Johnson v. Travis*, 33 Minn. 231; *Ceit v. Wallace*, 24 N. J. L. 291; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Royal v. Smith*, 40 Ia. 615; *Reed v. Clark*, 47 Cal. 194; *Collins v. Mack*, 31 Ark. 685; *Jacoby v. Stark*, 205 Ill. 34; and see *Bolyard v. Bolyard*, 91 S. E. 529, where, on the breach of a bond by a husband and his father that the husband would live with, support and treat her kindly, it was held that damages for mutual suffering could be given; and *Burrus v. R. Co.*, 38 Nev. 156, 145 Pac.

And damages for mental anguish and injury to feelings have been allowed for failure to furnish a wedding trousseau,⁴ for breach of a contract for the burial or care of a corpse⁵ and against a telegraph company for failing to deliver or for delay in a message announcing the illness, death or burial of a near relative.⁶ A son has been allowed damages for mental anguish where a steamship company on an ocean voyage buried his father's body at sea.⁷

§ 484. *Duty Not to Increase Damages.*

One injured by a breach of contract is required to make reasonable exertions to render the injury as light as possible; and if he, through his negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss falls upon him.¹ Thus where one has employed an agent to procure insurance on his property, and knows of his neglect to do so in ample time to procure it himself, he cannot hold the agent for a loss caused by such neglect.²

§ 485. *Liquidated Damages and Penalties Distinguished.*

The parties to a contract frequently assess the damages at which they rate a breach of the contract by one or both of

926, where such damages were allowed against a carrier for breach of its contract to carry the plaintiff's son to a place where he could receive medical attention.

⁴ Lewis v. Holmes, 109 La. 1039. See Oppola v. Kramshaar, 102 N. Y. App. Div. 306.

⁵ Hale v. Bonner, 82 Tex. 33; Renihan v. Wright, 125 Ind. 536; contra where a carrier delayed the delivery of a coffin; South Ex. Co. v. Byers, 240 U. S. 612.

⁶ As to this the authorities are hopelessly in conflict. See notes in 13 L. R. A. 859, 59 L. R. A. 398.

⁷ Finley v. Atlantic Transport Co., 220 N. Y. 249, 115 N. E. 715.

¹ Hassard v. Hardison, 114 N. C. 482, 19 S. E. 729; Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Wright v. Metropolis Bank, 110 N. Y. 237, 6 Am. St. Rep. 356; Uhlig v. Barnum, 43 Neb. 584, 61 N. W. 750; Bannon v. St. Bernard Coal Co., 39 S. E. 252 (Ky.).

² Brant v. Gallop, 111 Ill. 487, 53 Am. Rep. 638.

them, and introduce their assessment into the terms of the contract. This is perfectly legal, and on a breach the sum agreed upon becomes the measure of damages;¹ as, for example, a stipulation in a building contract that if the building is not completed by a certain day the contractor will pay a certain fixed sum for each day or week or month he is in default,² or an agreement in a contract of sale that a certain sum shall be deducted from the purchase price if the quantity is not delivered as agreed.³ These are called "*liquidated damages*."

But the parties in affixing a fixed sum for the non-performance of his promise by one, or each of them, may have intended not to assess the damages at which they rate the non-performance of the promise, but to secure its performance by the imposition of a penalty in excess of the actual loss likely to be sustained. And in this case, the amount recoverable is limited to the loss actually sustained, regardless of the sum undertaken to be paid by the defaulter.⁴ These are called "*penalties*."⁵

¹ Pearson v. Williams, 24 Wend. 246, 26 Wend. 630; Williams v. Vance, 9 S. C. 374, 30 Am. Rep. 26; Tardeveau v. Smith, Hardin, 175; 3 Am. Dec. 727; McCurry v. Gibson, 18 South 806 (Ala.); Hender-son v. Murphee, 20 South 45 (Ala.).

² Watts v. Sheppard, 2 Ala. 425; Worrall v. McClingham, 5 Strob. 115; Louis v. Brown, 7 Or. 326; Hall v. Crowley, 5 Allen 304, 81 Am. Dec. 745; Curtis v. Van Bergh, 161 N. Y. 47; Hennessy v. Metzger, 152 Ill. 505.

³ Bergheim v. Blaenavon Iron Co., L. R. 10 Q. B. 317; Muehlebach v. R. Co., 166 Mo. App. 305, 148 S. W. 453.

⁴ Whitfield v. Levy, 35 N. J. (L.) 149; Morse v. Rathburn, 42 Mo. 594, 97 Am. Dec. 359; Curry v. Larer, 7 Pa. St. 470, 49 Am. Dec. 486; Bradstreet v. Baker, 14 R. I. 546; Lansing v. Dodd, 45 N. J. (L.) 525.

⁵ Thus in bonds, the penalty is generally placed at double the sum, yet only the exact amount of damage caused by the nonperformance can be recovered. But there is this distinction between bonds and other written instruments. In an action on a bond the obligee can in no case recover more than the amount of the penalty. Warden v. Nielson, 1 Murph. 275, 3 Am. Dec. 691; Carter v. Carter, 4 Day, 30, 4 Am. Dec. 177; Cherry v. Mann, Cooke, 268, 5 Am. Dec. 696; Lom-

§ 486. *Same—Construction of Contracts as to.*

The courts will always construe the contract in harmony with the intention of the parties, and without regard to the terms used. If the general effect of the agreement shows that they intended to provide for a penalty they will restrict the recovery to the actual damages incurred, although the words "liquidated damages," are used in the instrument.¹ So, where the parties have used the milder term "penalty," the courts have held that the stipulated sum was, from the nature of the case, to be considered as liquidated damages and recoverable in full.² Whether the sum is to be treated as a penalty, or as liquidated damages, is a question of law, to be decided by the court, upon a consideration of the whole instrument."³ Where it is plain that the parties meant the sum fixed to be liquidated damages, the courts will not interfere to frustrate that intention.⁴ Thus

bard v. Mayberry, 24 Neb. 674, 8 Am. St. Rep. 234. While in the case of other instruments, the action may be brought for a breach without regard to the penalty and if they can be proved, damages in excess of it may be recovered. Holley v. Holley, Litt. Sel. Cas. 505, 12 Am. Dec. 342; Graham v. Bickham, 2 Yeates, 32, 1 Am. Dec. 328; Shreve v. Brereton, 51 Pa. St. 175; Meinert v. Boettker, 62 N. W. 276 (Minn.).

¹ Dwinel v. Brown, 54 Me. 468; Foley v. McKeegan, 4 Ia. 1, 66 Am. Dec. 107; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Dennis v. Cummings, 3 Johns. Cas 297, 2 Am. Dec. 160; Baird v. Tolliver 6 Humph. 186, 44 Am. Dec. 298; Curry v. Larer, 7 Pa. St. 470, 49 Am. Dec. 487; Grand Tower Co. v. Phillips, 23 Wall. 471.

² Sparrow v. Paris, 7 Hurl. & N. 594, 31 L. J. Ex. 137; Parfitt v. Chambre, L. R. 15 (Eq.) 36; Duffy v. Shockey, 11 Ind. 70, 71 Am. Dec. 349.

³ Sainter v. Ferguson, 1 Man. & G. 286; Chase v. Allen, 13 Gray, 42; Whitfield v. Levy, 35 N. J. (L.) 149; Hamaker v. Schroers, 49 Mo. 406; Kemp v. Knickerbocker Ice Co., 69 N. Y. 45; Jaqueth v. Hudson, 5 Mich. 123; Guerin v. Stacey, 175 Mass. 595; Sun Printing Assn. v. Moore, 183 U. S. 642; Pye v. British Auto Syndicate, 1 K. B. 425 (1906).

⁴ Williams v. Vance, 9 S. C. 344, 30 Am. Rep. 26; Bagley v. Peddie, 16 N. Y. 469, 69 Am. Dec. 713; Brooks v. Hubbard. 3 Conn. 58, 8 Am. Dec. 154.

where two lawyers dissolved partnership, one of them covenanted not to practice during the next seven years within fifty miles of E, nor interfere with or influence any of the clients of the late co-partnership; if he in any way infringed the covenant, he was to pay 1,000*l.* "as and for liquidated damages, and not by way of penalty." On breach of this covenant it was held that, no matter how slight the damage was, the whole 1,000*l.* had to be paid.⁵

"Parties," said Parke, B, "are bound by their contracts, if those contracts be clearly made. It is clear that the defendant stipulated to pay 1,000*l.* for the breach of any one of the conditions mentioned; and they are such that *the damage arising from the violation of any of them cannot be exactly estimated beforehand.*"

If, however, it be doubtful whether the sum named was intended to be a penalty, or liquidated damages, it will be construed to be a penalty, it being the tendency of the courts to consider the contract as creating a penalty to cover the damages actually sustained by a breach, rather than liquidated damages.⁶

§ 487. *Same—Rules for Construction of Such Contracts.*

Subject to the principles stated in the last section the courts have adopted certain rules of construction, in contracts containing promises of this kind:

1. If the contract is for a matter of certain value and a sum is fixed to be paid on breach of it which is in excess

⁵ *Galsworthy v. Strutt*, 1 Ex. 659.

⁶ *Colwell v. Lawrence*, 38 N. Y. 71; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Scofield v. Tompkins*, 95 Ill. 190; 35 Am. Rep. 160; *Foley v. McKeegan*, 4 Iowa, 1, 66 Am. Dec. 107; *Tayloe v. Sandiford*, 7 Wheat. 13; *Baird v. Tolliver*, 6 Humph. 186, 43 Am. Dec. 298; *Ricketson v. Richardson*, 19 Cal. 330; *Wilson v. Mayor*, 34 Atl. 774 (Md.). A sum deposited as a guaranty of the performance of a contract is not construed as liquidated damages. *Barber Asphalt Co. v. St. Paul*, 162 N. W. 470, and note L. R. A. 1917, E. 372; *Kirby v. U. S.* (U. S.), 273 Fed. 391.

of that value, then the sum fixed is a penalty and not liquidated damages.¹

2. If the contract is for a matter of uncertain value and a sum is fixed to be paid on breach of it, the sum is recoverable as liquidated damages. There is "nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree."²

3. Where the contract involves several distinct matters of various kinds, and one fixed sum is stipulated to be paid for any breach, of whatever kind, it is a penalty and not liquidated damages.³

In *Kemble v. Farren*,⁴ a contract between the manager of a theater and an actor, containing many stipulations on each side, of various degrees of importance, as to the times and manner of the performances, the regulations of the theater, and for the payment of salary at so much per night, provided that if either party should neglect to fulfill the said agreement, or any part thereof, he should pay to the other the sum of £1,000. It was held that the sum was a penalty, and not liquidated damages.

¹ *Taylor v. Sandiford*, 7 Wheat. 13; *Scofield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *Mason v. Callendar*, 2 Minn. 350, 72 Am. Dec. 103; *Barth v. Folley*, 6 Humph. 186; *Elzy v. R. Co.* (Iowa), 183 N. W. 378.

² *Hamilton v. Overton*, 6 Blackf. 206, 38 Am. Dec. 136; *Cotheal v. Talmage*, 9 N. Y. 551, 61 Am. Dec. 717; *Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 359; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *California Steam Nav. Co. v. Wright*, 6 Cal. 259; 65 Am. Dec. 511; *Bagley v. Peddie*, 16 N. Y. 469; 69 Am. Dec. 713; *Duffey v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Holbrook v. Tobey*, 66 Me. 410, 22 Am. Rep. 581; *Muse v. Swayne*, 2 Lea, 251, 31 Am. Rep. 607. Yet the sum named must not be unconscionable in its amount or the court will relieve. *Bradstreet v. Baker*, 14 R. I. 546; *Davis v. U. S.*, 17 Ct. Cl. 201.

³ *Foley v. McKeegan*, 4 Iowa 1, 66 Am. Dec. 107; *Owens v. Hodges*, 1 McMull, 106; *Charleston Fruit Co. v. Bond*, 26 Fed. 18; *Thorngood v. Walker*, 2 Jones, 15; *Chicago R. Co. v. Dockery*, 195 Fed. 221; *Corp. v. Pearlman*, 193 N. Y. S. 670.

⁴ 6 Bing. 141.

“If, therefore, on the one hand, the plaintiff had neglected to make a single payment of £3 6s 8d per day, or, on the other hand, the defendant had refused to conform to any usual regulation of the theater, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of £1,000. But that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern time, endeavored to relieve, by directing juries to assess the real damages sustained by the breach of the agreement.”

A recent English writer says:

“If the agreement, for instance, were not, as it was in *Kemble v. Farren*, one containing *various stipulations of various degrees of importance*, but if there were *only one event* upon which the money was to become payable, or if there were *several events*, but the damages impossible accurately to measure, then no attempt to turn liquidated damages into a mere penalty would be successful; and in such cases it would be of no consequence whether in the contract the sum to be paid in the event of breach was called “a penalty” or “liquidated damages,” because the Court will look to the meaning and effect of the contract itself as disclosing *the intention of the parties*, and, having satisfied itself on that point, does not care much for the term they happen to have selected from Johnson’s Dictionary. The test is whether the sum stipulated for can or cannot be regarded as *a genuine pre-estimate of the creditor’s probable or possible interest in the due performance of the principal obligation*, or is a sum liable to fluctuation in amount according to circumstances.”⁵

§ 488. *No Second Action for Same Damages.*

Where the damages have been finally assessed in an action,

⁵ Shirley Leading Cases, 438 Citing; *Catton v. Bennett* (1884), 51 L. T. 70; *Elphinstone v. Monkland Iron Co.* (1886), 11 App. Cas. 332; 35 W. R. 17; *In re White and Arthur* (1901), 84 L. T. 594; 50 W. R. 81.

the amount is conclusive, and no future loss subsequently arising from the same cause can be made the ground of a new action.¹ One who has failed to recover all the damages occasioned him by a single breach of a contract, because he did not properly declare for a portion of them in the first suit, cannot maintain a second suit for the recovery of such portion.² On one bringing an action for a part only of an entire and indivisible demand, the verdict and judgment in that action are a conclusive bar to a subsequent suit for another part of the same demand.³ Where there has been a total breach of contract, the plaintiff may, if he demands it, recover full and final damages for the future as well as the past, although the period for full performance has not elapsed.⁴ The true criterion whether damages for the non-performance of the whole contract, including damages not sustained when the action is brought and the suit is tried, can be recovered is, whether there has been such a breach of the contract as authorizes the plaintiff to treat it as entirely putting an end to it.⁵

But damages cannot, in one action, be assessed in respect of any matter that would be ground for a new cause of action. Thus in the case of a continuing breach of a covenant to keep premises in repair, no damage can be given in respect of the probable continuance of the breach; but the damage for a continued breach must be sought in a new action, to which, therefore, the judgment recovered in a former action, including damages for the breach up to the time of that action only, would be no bar.⁶

¹ *Gibbs v. Cruikshank*, L. R. 8 Com. P. 454.

² *Morey v. King*, 51 Vt. 383.

³ *Miller v. Covert*, 1 Wend. 487.

⁴ *Tippin v. Ward*, 5 Or. 450.

⁵ *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140.

⁶ *Coward v. Gregory*, L. R. 2 Com. P. 153; *McCleary v. Malcom Brewery Co.*, 67 N. Y. S. 258.

CHAPTER XIX.

SPECIFIC PERFORMANCE.

- Section 489. The Remedy of Specific Performance—General Rules.
490. Specific Performance Decreed Only Where Damages are Inadequate Remedy.
491. Contracts for the Sale of Lands.
492. Effect of the Statute of Frauds.
493. Contracts for the Sale of Chattels.
494. Breaches of Contracts Generally.
495. Vendor as Well as Vendee Entitled.
496. Performance Compelled by Means of Injunction.

§ 489. *The Remedy of Specific Performance—General Rules.*

The common law treated every executory contract to sell or transfer a thing as a mere personal contract, and if left unperformed by the party no redress could be had except in damages. The common law therefore allowed the party to either perform the contract or pay damages at his election. But the equity courts considering this in many cases quite inadequate to do justice between the parties, required from the defaulting party a strict performance of what he had promised, and which he could not, without a manifest fraud on his part, refuse.

Thus arose the jurisdiction of equity to compel performance, and as it was based upon the absence of any adequate remedy at law, it follows that where damages at law will put the plaintiff in as good a position as if the agreement had been actually performed, equity will decline to interfere.¹ And on general principles what are good grounds for refusing damages are also good grounds for refusing specific per-

¹ See post, § 490.

formance. Thus, if the contract be defective in the essential elements, whether in its formation, in its matter, or the parties thereto, or if it be voidable for mistake, fraud, or duress, or void for illegality, no relief can be had.² It will refuse specific performance where the plaintiff does not come into court "with clean hands"³ So of a voluntary or gratuitous contract or a covenant that is not supported by a valid legal consideration.⁴ And though adequacy of consideration is not in equity as it is not at law⁵ a material inquiry⁶ yet great inadequacy of consideration being regarded in equity as evidence of fraud, or mistake, or unfairness, or hardship, will

² *Bass v. Mayor, Meigs*, 421, 33 Am. Dec. 154; *Gerlach v. Skinner*, 34 Kan. 86, 55 Am. Rep. 240; *Dial v. Hair*, 18 Ala. 790, 54 Am. Dec. 179; *Kelly v. R. Co.*, 74 Cal. 557, 5 Am. St. Rep. 471; *Osborn v. Phelps*, 19 Conn. 63, 48 Am. Dec. 133; *Boynton v. Hazelboom*, 14 Allen 107, 92 Am. Dec. 738; *Clarke v. Aitken* (U. S.), 276 Fed. 21.

³ See note to *Langley v. Devlin*, 95 Wash. 171, 163 Pac. 395, in 4 A. L. R. 44. "He who comes into equity must come with clean hands" is a fundamental principle of Equity Jurisprudence. Equity therefore will not lend its aid to one who has been guilty of any reprehensible contract directly connected with the subject-matter of the litigation before the Court. Thereupon it will not aid a party who is actuated by a bad motive (*Peltzer v. Gilbert*, 260 Mo. 500, 169 S. W. 257), or who has been guilty of fraud (*Reynolds v. Boland*, 202 Pa. St. 642, 52 Atl. 19), or misrepresentation (*Leather Cloth Co. v. Am. Leather Co.*, 11 H. L. Cas. 523; *Munn Co. v. American Co.*, 83 N. J. (Eq.) 309, 91 Atl. 87), or has violated some statute (*Creath v. Sims*, 5 How. 192; *Downey v. Charles Grove Co.*, 201 Mass. 251, 87 N. E. 597). See an extensive note to *Langley v. Devlin*, 95 Wash. 171; 163 Pac. 395 in 4 A. L. R. 44. "The clean hands doctrine is a tool of courts of equity only and is not an instrument of the law, applicable in courts of law." *Hoosier Mine Co. v. Union Trust Co.*, 173 Ky. 505; 191 S. W. 305.

⁴ *Mercer v. Stark, Walk.* (Miss.) 451, 12 Am. Dec. 583; *Woodcock v. Bennett*, 1 Cow. 711, 13 Am. Dec. 568; *Owning's Case*, 1 Bland 370, 17 Am. Dec. 311; *Anderson v. Green*, 7 J. J. Marsh. 448, 23 Am. Dec. 417; *Forward v. Armstead*, 12 Ala. 124, 46 Am. Dec. 246; *Taylor v. Staples*, 8 R. I. 170, 5 Am. Rep. 556; *Hickman v. Grimes*, 1 A. K. Marsh. 86, 10 Am. Dec. 714; *Shackelford v. Handley*, 1 A. K. Marsh. 496, 10 Am. Dec. 753; *Keffer v. Grayson*, 76 Va. 517, 44 Am. Rep. 171; *Chemical Works v. Iliff*, 132 N. E. 806.

⁵ See ante, Chap. IV.

⁶ *Seymour v. Delancy*, 3 Cow. 445, 15 Am. Dec. 270; *Coles v. Trecotheck*, 9 Ves. 246; *Davidson v. Little*, 22 Pa. St. 245, 6 Am. Dec. 81.

materially influence the discretion of the court.⁷ Nor will the court decree specific performance where the contract is incomplete and uncertain;⁸ nor where there is strong doubt whether the parties understood the contract alike;⁹ nor unless the plaintiff establishes the agreement by clear and satisfactory evidence.¹⁰

There are certain cases where equity refuses to compel specific performance without regard to the question whether adequate relief can be obtained at law or not.¹¹

1. Where the agreement between the parties is not mutual. Equity will not order the contract to be performed by B if it appear that if A had been the one in default it would not have been able to make a similar decree against A.¹² An

⁷ *Seymour v. Delancy*, 6 Johns. Ch. 222; *Seymour v. Delancy*, 3 Cow. 445, 15 Am. Dec. 270; *Rodman v. Zilley*, 1 N. J. (Eq.) 320.

⁸ *Blanchard v. McDougal*, 6 Wis. 167, 70 Am. Dec. 458; *Huff v. Shepperd*, 58 Mo. 742; *McGuire v. Stevens*, 42 Miss. 724, 2 Am. Rep. 649; *Rankin v. Maxwell*, 2 A. K. Marsh. 488, 12 Am. Dec. 431; *Hanly v. Blackford*, 1 Dana, 1, 25 Am. Dec. 114; *Carr v. Duval*, 14 Pet. 77; *Hammer v. McEldowney*, 46 Pa. St. 434; *Preston v. Preston*, 95 U. S. 200; *Cherbonnier v. Cherbonnier*, 108 Mo. 252; *Tedford v. Trimble*, 87 Mo. 226; *Maning v. Ayres*, 77 Fed. 690. Courts of law will give damages for breach of agreements which equity would regard as too indefinite to specifically enforce. *Huse, etc., Co. v. Heinze*, 102 Mo. 245; *Belch v. Miller*, 32 Mo. (App.) 387.

⁹ *Coles v. Bowne*, 10 Paige. 526; *Corelyou's Appeal*, 102 Pa. St. 576; *Dixon v. Dixon*, 48 Atl. Rep. 152 (Md.); *Miller v. Clark* (Ill.), 133 N. E. 685.

¹⁰ *Strange v. Crowley*, 91 Mo. 287; *Magee v. McManus*, 70 Cal. 553; *Mo. Pac. R. Co. v. McCarty*, 97 Mo. 214; *Veth v. Gierth*, 92 Mo. 97.

¹¹ Though it is said that a party is never entitled to a decree for specific performance as a matter of right. *McComas v. Easley*, 21 Gratt. 23; *Hale v. Wilkinson*, 21 Gratt. 75; *Veth v. Garth*, 92 Mo. 97; and that it is always a matter in the discretion of the courts, this discretion is nevertheless governed by strict rules and principles. Therefore, where the case meets all the conditions, and requirements for applying the remedy, the decree for specific performance is as much a matter of course as a judgment for damages at law. See *Pom. Eq. Jur.*, § 1404.

¹² *Morgan v. Morgan*, 2 Wheat. 290; *Bodine v. Glading*, 21 Pa. St. 50, 59 Am. Dec. 747; *Benedict v. Lynch*, 4 Johns. Ch. 370, 7 Am. Dec. 484; *Marble Co. v. Ripley*, 10 Wall. 339; *Watts v. Kinney*, 3 Leigh, 272, 23 Am. Dec. 266; *De Cordova v. Smith*, 9 Tex. 129, 58 Am. Dec. 136; *Am. League Baseball Club v. Chase*, 149 N. Y. S. 6.

infant or one who is incapable of performing on his part cannot ask specific performance of it,¹³ unless he has performed his part,¹⁴ nor will equity decree specific performance where the plaintiff is insolvent or bankrupt or cannot do what he has agreed to do without a breach of trust.¹⁵

In *Ogden v. Fossick*,¹⁶ A agreed to give B a lease of certain premises of which A was to be employed by B as manager during the term. It was held that the court would not order the performance of A's agreement, because it could not enforce B's promise to employ A.¹⁷

An apparent exception arises where a plaintiff asks for specific performance of an agreement under the statute of frauds signed only by the defendant and hence not binding on the plaintiff if he had been sued on it.¹⁸ But a decree in such a case is supported on the ground that the plaintiff by filing his bill for relief has admitted the claim to be legal and has made the remedy mutual.¹⁹

2. Where it would operate unreasonably hard on the de-

¹³ *McHugh v. Wells*, 39 Mich. 175; *Griffin v. Cunningham*, 19 Gratt. 571; *Tarr v. Scott*, 4 Brewst. 49; *Scott v. Wizard* (Ala.), 91 S. 806.

¹⁴ *Asberry v. Mitchell*, 93 S. E. 628 (Va.) and note L. R. A. 1918 A. 787. In England an infant cannot obtain specific performance of a contract made by him, *Flight v. Bolland*, 4 Russ. Ch. 298, and this case has been followed here, *Ten Eyck v. Manning*, 52 N. J. Eq. 47, 27 Atl. 900. But after he has performed his part of the contract he may maintain a suit for specific performance. *Laffollett v. Kyle*, 51 Ind. 446; *Asberry v. Mitchell*, 93 S. E. 638 (Va.).

¹⁵ *Lowes v. Lush*, 14 Ves. 547; see *McFarlane v. Williams*, 107 Ill. 33; *Tolson v. Sheard*, L. R. 5 Ch. Div. 19; *Rice v. D'Arville*, 39 N. E. 180 (Mass.).

¹⁶ 32 L. J. Ch. 73.

¹⁷ And see *Blackett v. Bates*, L. R. 1 Ch. 125; *Brick v. Smith*, 27 Mich. 166, 18 Am. Rep. 84.

¹⁸ See ante, Chap. III.

¹⁹ *Martin v. Mitchell*, 2 J. & W. 426; *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 501; see note 7 Am. Dec. 492; *Focke v. Havel* (Kan.), 205 P. 349.

defendant,²⁰ the agreement is unreasonable,²¹ or its decree would produce injustice or would be inequitable under all the circumstances.²² In *Trustees of Columbia College v. Thacher*,²³ the owners of adjacent premises in the city of New York mutually covenanted that only dwelling houses should be erected and that they would not carry on or suffer any kind of manufactory, trade or business therein. Subsequently by the advance of business to that place and the construction of an elevated railroad in the street, the value of the premises for anything but trade purposes was greatly impaired. The court held that though the covenant ran with the land and the breach of it would render the party liable in damages, yet it would not be specifically enforced.

“It certainly is not the doctrine of courts of equity to enforce by its peculiar mandate every contract in all cases even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion in view of the circumstances of the case and the plaintiff’s prayer for relief is not answered when under those circumstances the relief he seeks would be inequitable. * * Though the contract was fair and just when made the interference of the court should be denied if subsequent events have made performance by the defendant so onerous that its enforcement would impose great hardship upon him and cause little or no benefit to the plaintiff.”

3. Where it has no capacity to insure the performance. This rule illustrates the distinction between lands and chattels. An agreement for the purchase of land can be performed by the

²⁰ *Johnson v. Hubbell*, 10 N. J. (Eq.) 332, 66 Am. Dec. 773; *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44; *Bryan v. Loftus*, 1 Rob. (Va.) 12, 39 Am. Dec. 242; *Coe v. R. R. Co.* 31 N. J. (Eq.) 105; *Marble Co. v. Ripley*, 10 Wall, 339; *Barnett v. Spratt*, 4 Ired Eq. 171; *Pope Man. Co. v. Gormully*, 144 U. S. 224.

²¹ *Higgins v. Butler*, 78 Me. 520.

²² *Margraf v. Muir*, 57 N. Y. 155; *Chicago, etc., R. Co. v. Schoenmann*, 90 Ill. 258; *Solomon v. Shemtzh*, 185 Mich. 620; 152 N. W. 196; *Thurston v. Arnold*, 43 Ia. 43; *Friend v. Lamb*, 152 Pa. St. 529.

²³ *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365.

doing of a specific act, the execution of a deed, or conveyance. In a contract for the sale and delivery of goods, performance may extend over some time and involve the fulfillment of various terms, and "the court acts only where it can perform the very thing in the terms specifically agreed upon."²⁴ Therefore specific performance will not be decreed of a contract requiring the direct superintendence of the court, nor where the contract or duties to be performed are continuous;²⁵ as, for example, an agreement to erect a building;²⁶ or to construct a railroad;²⁷ or a covenant to repair;²⁸ or an agreement to do work and labor of any kind.²⁹ And for a like reason it will refuse to grant specific performance of contracts involving personal services.³⁰

On this ground it will not decree specific performance where the decree would be nugatory or useless.³¹ It will not enforce

²⁴ *Wolverhampton R. Co. v. L. & N. W. R. Co.* L. R. 16 (Eq.) 439.

²⁵ *Danforth v. R. Co.*, 30 N. J. (Eq.) 12; *Electric Light Co. v. R. Co.*, 19 South 721 (Ala.); *Thiebaud v. Union Fur. Co.*, 42 N. E. 741 (Ind.); *Wolverhampton R. Co. v. R. Co.* L. R., 16 Eq. 429; *Standard Fashion Co. v. Siegel Cooper Co.*, 157 N. Y. 60. Specific performance by way of an injunction will not be denied on the ground that it involves the performance of continuous duties that a court cannot supervise where it enjoins the shutting off, in violation of its contract, of a supply of light by an electric light company. *Mobile Electric Co. v. Mobile*, 79 South. 39 (Ala.).

²⁶ *Fallon v. R. Co.* 1 Dill. 121; *Gray v. Hawkins*, 8 Ohio St. 449, 72 Am. Dec. 600; *Rose v. R. Co.* 1 Woolw. 26; *Lewis v. Ludlam*, 189 N. Y. S. 636.

²⁷ *Fallon v. R. Co.*, supra; *McCann v. R. R. Co.*, 2 Tenn. Ch. 173; *Oregonian R. R. Co. v. Oreg. Nav. Co.*, 11 Sawy. 33.

²⁸ *Beck v. Allison*, 56 N. Y. 366, 15 Am. Rep. 430.

²⁹ *Marble Co. v. Ripley*, 10 Wall. 339; *Blanchard v. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Standard Fashion Co. v. Siegel Cooper Co.*, 51 N. E. 408 N. Y., 50 N. Y. 1056.

³⁰ *Willingham v. Hooven*, 74 Ga. 233, 58 Am. Rep. 435; *Clark's Case*, 1 Blackf. 122, 12 Am. Dec. 213; *De Rivafinoin v. Corsetti*, 4 Paige, 264; 25 Am. Dec. 532; *Marble Co. v. Ripley*, 10 Wall. 339; *McCauley v. Braham*, 16 Fed. 37, and note pp. 42-49; *Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App., 432.

³¹ *Webb v. Conn.* 1 Litt. 83, 12 Am. Dec. 225. A contract to assign letters patent will not be enforced where the bill is filed only a short time before the patent expires. *Werden v. Graham*, 107 Ill. 169; *Lumber Co. v. R. Co.* (Tenn.), 238 S. W. 867.

an agreement which is revocable or only to be performed at the option of the defendant, for its interference in such case would be idle, since what it had done might be instantly undone.³²

In *Rust v. Conrad*,³³ the court says:

“The court will also refuse to interfere in any case where, if it were to do so, one of the parties might nullify its action through the exercise of a discretion which the contract or the law invests him with. The refusal in such a case does not depend of necessity upon any illegality, inequality, or unfairness, but it is sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense, of an investigation of disputes when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing. A familiar instance is that of a contract for the formation of a partnership, which, though it is within the power of the court to enforce it, and it may be done under special circumstances, when by its terms the partnership is to continue for a definite period, yet in the absence of a provision to that effect, performance will invariably be refused, though the terms may be in all respects equal, fair, and legal.³⁴ The reason is, that the partnership which the court might establish by its decree, the parties, or either of them, might immediately dissolve.”

And specific performance will not be decreed where performance is obviously impossible;³⁵ as, where a vendor whom it is sought to compel to convey the land contracted for, has no title,³⁶ or cannot obtain a title to the land,³⁷ or has

³² *Express Co. v. R. R. Co.*, 99 U. S. 191; *Marble Co. v. Ripley*, 10 Wall. 359; *Barker v. Critzer*, 35 Kan. 459; *Sturgis v. Galindo*, 59 Cal. 28, 43 Am. Rep. 239.

³³ 47 Mich. 449, 41 Am. Rep. 720.

³⁴ *Hercy v. Birch*, 9 Ves. 357; *Meason v. Kaine*, 63 Pa. St. 335.

³⁵ *Pack v. Gaither*, 73 N. C. 95; *Suëll v. Mitchell*, 65 Me. 48; *In re Burk*, 75 Pa. St. 141, 15 Am. Rep. 587.

³⁶ *Fitzpatrick v. Featherstone*, 3 Ala. 40; *Stevenson v. Buxton*, 15 Abb. Pr. 352; *Nicol v. Carr*, 35 Pa. St. 381.

³⁷ *Love v. Camp*, 6 Ired. Eq. 209, 51 Am. Dec. 419; *McQueen v. Chouteau*, 20 Mo. 222, 64 Am. Dec. 178; *Gupton v. Gupton*, 47 Mo.

conveyed it to a purchaser for value without notice or to one who though having notice of the contract has the prior right to a conveyance.³⁷ In *Huguenin v. Courtney*,³⁸ A agreed to sell to B a leasehold interest. Before the time for B's entry arrived, a part of the land was carried away by the sea. It was held that A could not compel specific performance of the contract.

4. Where the plaintiff has himself broken the contract or has made a material default in performance on his part.⁴⁰ It is required that the plaintiff shall show performance, or readiness to perform, before he can ask the aid of the court against the other party. Nevertheless specific performance may be decreed against⁴¹ a purchaser with compensation for an inconsiderable part of the subject of sale which the vendor is unable to convey,⁴² provided the deficiency is small, and not material to the enjoyment of the rest.⁴³ And

47; *Brewer v. Wall*, 23 Tex. 585, 76 Am. Dec. 76. If a husband agrees to procure his wife to join with him in a conveyance of her land, and the wife refuses to do so, a court of equity will not decree a specific performance. 1 Maddock's Chancery Practice, 339. Sugden on Vendors, 151.

³⁸ *Sauer v. Ferris*, 34 N. E. Rep. 52 (Ill.).

³⁹ 21 S. C. 403, 53 Am. Rep. 688.

⁴⁰ *Wells v. Smith*, 7 Paige, 22, 31 Am. Dec. 275; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Datz v. Phillips*, 137 Pa. St. 203; *Ashe, Carson Co. v. Bonifay*, 147 Ala. 276, 41 South. 816; *Newby v. Lawrence*, 84 Neb. 622, 121 N. W. 165; *Enkema v. McIntyre*, 136 Minn. 293, 161 N. W. 587, and note in 2 A. L. R. 416; *Poe v. Kemp* (Ala.), 89 S. 716.

⁴¹ *Boone v. Iron Co.*, 19 How. 340; *Young v. Daniels*, 2 Ia. 126, 63 Am. Dec. 477; *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725; *Rogers v. Saunders*, 16 Me. 72, 33 Am. Dec. 635.

⁴² *McQueen v. Farquhar*, 11 Ves. 467; *Evans v. Kingsberry*, 2 Rand. 120, 14 Am. Dec. 779; *King v. Bardeau*, 6 John. Ch. 38, 10 Am. Dec. 312.

⁴³ *McKean v. Read*, Litt. Sel. Cas. 395; 12 Am. Dec. 318; *Perkins v. Ede*, 16 Beav. 193; *Howard v. Kimball*, 65 N. C. 175, 6 Am. Rep. 739; *Murphy v. Hohne*, 74 South. 973 (Fla.), and note L. R. A. 1917 F. 597.

a purchaser is entitled to specific performance against the vendor, so far as the latter may be able to complete the contract, with compensation for any deficiency.¹¹ In general the purchaser is entitled to take, if he pleases, performance with a defect, which the vendor would not be able to enforce against him.

§ 490. *Specific Performance Decreed Only Where Damages Are Inadequate Remedy.*

Subject to the rules given in the last section, the principle upon which equity jurisdiction is based, as already stated, is the absence of any adequate remedy at law.¹ This is illustrated by the different views which courts of equity take of contracts for the sale of land and for the sale of goods. The objects with which a man purchases a particular piece of land are different to those with which he purchases goods. He may be influenced by the merits of the site or its neighborhood, and these cannot be represented by a money compensation; whereas goods of the kind and quality that he wants are generally to be purchased. Hence specific performance of a contract for the sale of goods is only decreed in very rare cases,² while land or any interest in land is always the subject of equity jurisdiction of this kind; and it must be borne in mind, in making this distinction, that the performance is decreed in the one case and refused in the other

¹¹ Walling v. Kinnard, 10 Tex. 508, 60 Am. Dec. 216; Harbers v. Gadsden, 6 Rich. Eq. 284, 62 Am. Dec. 390; Tonn v. Ticknor, 112 Ill. 217.

¹ See ante, § 489. Willard v. Tayloe, 8 Wall. 557; Morgan v. Morgan, 3 Stew. 383, 21 Am. Dec. 638; Peters v. Phillips, 19 Tex. 70, 70 Am. Dec. 319; Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 67. That a note or contract is tainted with usury or other illegality gives equity no power to enjoin an action on them; for the defense is good at law. Atkinson v. Allen, 71 Fed. Rep. 58; Beer v. Landman, 31 S. W. Rep. 805 (Tex.); Williams v. Oil Co., 270 Fed. 9; Inv. Co. v. Heating Co. (Wash.) 193 P. 210.

² See Gottschalk v. Stein, 27 Cent. L. J. 82.

not upon any distinction between realty and personalty but because damages in the one case may not, in the other usually will, afford a complete remedy.

§ 491. *Contracts for the Sale of Lands.*

Therefore, contracts for interests in or for the sale of lands are a proper subject for specific performance, even though the plaintiff may have a remedy at law for the purchase money which he has paid over or for damages for the injury he has sustained.¹

§ 492. *Effect of the Statute of Frauds.*

We have seen that an unwritten contract for the sale of land is unenforceable in courts of law:¹ and the statute binds courts of equity as well.² Nevertheless, a court of equity will decree specific performance of an oral contract within the statute, where there have been such acts of performance by the party asking relief that he would suffer an injury amounting to a fraud if the other party should not perform his part of the contract.³ In such cases the court, having

¹ Willard v. Tayloe, 8 Wall. 557; Blanchard v. R. Co. 31 Mich. 43, 18 Am. Rep. 142; Sproule v. Winant, 7 T. B. Mon. 195, 18 Am. Dec. 165; Phyfe v. Wardell, 5 Paige, 268, 28 Am. Dec. 430. And the court's jurisdiction extends even to lands which are out of its jurisdiction or in another country if the parties are within it. Equity acts *in personam*; Penn v. Lord Baltimore, 2 Vern. 444, 2 White and Tudor's Lead. Cas. 837; Toller v. Carteret, 2 Vern. 495; Sutphen v. Fowler, 9 Paige, 280; Brown v. Desmond, 100 Mass. 267; Newton v. Robinson, 13 N. Y. 587, 67 Am. Dec. 89; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Realty Co. v. De Lancy (Minn.), 188 N. W. 212.

² Ante, Chap. III.

³ Patterson v. Yeaton, 47 Me. 308; Abel v. Caldermore, 4 Cal. 90; Johnson v. Baldock (Ok.), 201 P. 654.

⁴ 3 Pomeroy's Eq. Jur. § 1409; Brown v. West. Maryland R. Co., 99 S. E. 457 (W. Va.). The rule is otherwise in some states. A verbal contract, though void under the statute of frauds, may still be proved in resistance to a suit for an injunction, for the purpose of showing that it would be inequitable to grant it. Denver R. Co. v. Ristriue, 77 Fed. Rep. 58.

general jurisdiction to relieve against fraud, applies the remedy by enforcing the contract, not because the contract, as such, is binding on the parties, but because the enforcement thereof is the most effectual way to prevent the perpetration of a fraud.⁴

Payment of the purchase money is not such "part performance" as will take the case out of the statute.⁵ Nor is possession taken without the consent of the vendor,⁶ or not in pursuance of the contract of sale.⁷ Nor is marriage part performance of a parol contract made in consideration of marriage.⁸ But possession of lands under a parol contract of sale amounts to part performance when it is connected with the contract of sale, and in consequence and pursuance of it, and was intended to be in execution of it.⁹ And so does

⁴ *Benj. Prin. of Contr.* 48, citing *Jacobs v. R. R. Co.* 8 Cush. 225; *Wheeler v. Reynolds*, 66 N. Y. 237; *Riggley v. Erney*, 154 U. S. 244; *Peoples Ice Co. v. Trumbull*, 70 Fed. Rep. 166; *Herren v. Herren* (Wash.), 203 P. 34.

⁵ *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; *Cronk v. Trumble*, 66 Ill. 428; *Poland v. O'Connor*, 1 Neb. 50, 93 Am. Dec. 327; *Parke v. Leewright*, 20 Mo. 85; *Glass v. Hulburt*, 102 Mass. 24, 3 Am. Rep. 418. In the earliest cases it was held that the payment of a considerable portion of the purchase price would take a verbal contract for the sale of land out of the operation of the statute, while the payment of a small portion would not have that effect. *Lacon v. Mertkins*, 3 Atk. 4, per Lord Hardwicke, who held generally that part payment was a good part performance. *Child v. Comber*, 3 Swanst. 423, note; *Frieze v. Glenn*, 2 Md. Ch. 361; *Harwood v. Jones*, 10 Gill. & J. 404. But this distinction was long ago rejected as being based upon no sound principle. *Pomeroy's Spec. Perf.* § 112.

⁶ *Purcell v. Miner*, 4 Wall. 513; *Moore v. Higbee*, 45 Ind. 487; *Howe v. Rogers*, 32 Tex. 218; *Hayworth v. Hayworth* (Mo.), 236 S. W. 26.

⁷ *McNeil v. Jones*, 21 Ark. 277; *Charpiot v. Sigerson*, 25 Mo. 63; *Glass v. Hulburt*, 102 Mass. 32, 3 Am. Rep. 418; *Ann Berta Lodge v. Leverton*, 42 Tex. 26; *Miller v. Ball*, 64 N. Y. 292.

⁸ *Caton v. Caton*, L. R. 1 Ch. App. 137; *Ungley v. Ungley*, L. R. 4 Ch. Div. 73; *Finch v. Finch*, 10 Ohio St. 501; *Fleener v. Fleener*, 29 Ind. 564; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810.

⁹ *Wood v. Thornby*, 58 Ill. 464; *Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289; *Barnes v. R. Co.*, 130 Mass. 388; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Rankin v. Simpson*, 19 Pa. St. 471, 57 Am. Dec. 668; *Parrill v. McKinley*, 9 Gratt. 1, 58 Am. Dec. 212; *Blan-*

the making of valuable and permanent improvements on the land by the purchaser.¹⁰

Though the statute is a good defense where specific performance of a parol contract is sought against the vendor; yet if the vendor be willing to perform, the part of the purchase money that has been paid cannot be recovered back.¹¹ The statute will not prevent a decree where the agreement in the bill is admitted, and the statute is not relied on as a bar.¹²

§ 493. *Contracts for the Sale of Chattels.*

A court of equity will not decree a specific performance of a contract for the sale of chattels—because the breach may be sufficiently remedied by damages. If A refuses to deliver goods he has sold to B, the latter may purchase them elsewhere and recover the loss to him resulting from A's failure to perform.¹ This rule extends to all kinds of personal property including government bonds and the shares of stock and bonds of business corporations which are always to be bought in the market.² But in the application of this

chard v. McDougall; 6 Wis. 167, 70 Am. Dec. 458; Dugan v. Gittings, 3 Gill, 138, 43 Am. Dec. 306; Eaton v. Whittaker, 18 Conn. 222, 44 Am. Dec. 586; Seamen v. Ascherman, 51 Wis., 678, 37 Am. Rep. 849.

¹⁰ Glass v. Hulburt, 102 Mass. 35, 3 Am. Rep. 418; Moore v. Pier-son, 6 Iowa 279, 71 Am. Dec. 409; Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665; Potter v. Jacobs, 111 Mass. 32. The rendering of services is "part performance" where it is impossible to estimate their value by any pecuniary standard. Owens v. McNally, 45 Pac. Rep. 710; Townsend v. Vanemecker, 160 U. S. 171.

¹¹ Sims v. Hutchins, 8 Sm. & M. 328, 47 Am. Dec. 90.

¹² Baker v. Hollobaugh, 15 Ark. 322; Woods v. Dille, 11 Ohio, 455; Houser v. Lamont, 55 Pa. St. 311, 93 Am. Dec. 755.

¹ Eckstein v. Downing, 64 N. H. 248, 10 Am. St. Rep. 404.

² Fallon v. R. Co., 1 Dill. 121; Ross v. R. Co., 1 Woolw. 26; Cowles v. Whitman, 10 Conn. 121, 25 Am. Dec. 60; Foll's Appeal, 91 Pa. St. 137, 36 Am. Rep. 671; Strasburgh R. R. Co. v. Echterbach, 21 Pa. St. 220, 60 Am. Dec. 49; Eckstein v. Downing, 64 N. H. 248; 10 Am. St. Rep. 404; Southern Iron Co. v. Vaughan, 79 South. 212 (Ala.), and note L. R. A. 1918 E. 597; Kadetesky v. Palmer (Col.), 199 P. 490.

rule three classes of cases are excepted, though two of them are not exceptions to but rather further illustrations of the governing principle, viz.: that agreements will not be specifically enforced unless from the nature of the contract, the character of the subject-matter or other special and peculiar causes, damages will not be an adequate remedy.³

(a) Where the contract is made under special circumstances and for purposes requiring specific performance to render it of value.⁴ As, for example, a contract for the purchase of coal tar, solely obtainable in the city from defendant, and absolutely necessary to plaintiff's business;⁵ or for ship timber of a particular kind essential to the completion of a ship and which can be supplied by the vendor alone.⁶ Of the same nature is an agreement to furnish articles which the vendor only can supply because their manufacture is guarded by a patent.⁷ It is on this ground that in England and some of the States a distinction is made between government stock and the stock and bonds of railroad and business corporations on the ground that the latter are limited in number, and cannot always be had in the market.⁸

(b) Articles which have acquired a peculiar value to the owner and for the loss of which no damages would compensate,⁹ *e. g.*, an artist's picture painted by himself;¹⁰ or a

³ Adams v. Messenger, post; Dilburn v. Youngblood, 85 Ala. 447.

⁴ Clark v. Flint, 22 Pick. 231, 33 Am. Dec. 733.

⁵ Equitable Gas Light Co. v. Manfg. Co., 63 Md. 285.

⁶ Buxton v. Lister, 3 Atk. 383. So where payment was to be made, not in money but in specific securities. Rothalz v. Schwartz, 46 N. J. (Eq.) 477, 19 A. S. R. 409; Kleinsmith v. Trust Co. (Ore.), 203 P. 598.

⁷ Adams v. Messenger, post; Hapgood v. Rosenstock, 23 Fed. Rep. 86; see Binney v. Annan, 107 Mass. 74, 9 Am. Rep. 10.

⁸ Duncuft v. Albrecht, 12 Sim. 189; Asche v. Johnson, 2 Jones (Eq.) 149; Adams v. Messenger, 147 Mass. 185, 9 Am. St. Rep. 679; Johnson v. Brooks, 93 N. Y. 342; Smurr v. Kamen (Ill.), 133 N. E. 715.

⁹ Adams v. Messenger, 147 Mass. 185, 9 Am. St. Rep. 679; McGowan v. Remington, 12 Pa. St. 56, 51 Am. Dec. 584; Womack v. Smith, 11 Humph. 478, 54 Am. Dec. 51.

¹⁰ Downing v. Betteman, 2 J. & H. 544.

valuable picture, vase, or work of art; family pictures and furniture, or heirlooms; an antique horn, used as a symbol of tenure of land; the tobacco-box of a club; the dresses, decorations, papers, and effects of a lodge of Freemasons; a college memento; a box of jewels, deeds or instruments of title to land.¹¹ But it has been said,¹² that the common-law remedy "would not be considered inadequate, merely because the specific article might be more convenient or gratifying to the party than damages for withholding or destroying it; . . . and the principle must not be extended to cases founded in weakness and folly. It would therefore be a perversion of the rule to apply it to the delivery of a favorite spaniel or a lady's lap-dog."

(c) Under the general jurisdiction of equity to enforce trusts, if there be a trust, express or implied, the court will compel the specific performance of the contract, whether the chattels are common or special.¹³

§ 494. *Breaches of Contract Generally.*

The remedy at law for the breach of ordinary contracts—a judgment for damages—is sufficiently specific and adequate, and hence does not call for the equitable relief. Therefore specific performance will not be granted in such cases; as, for example, of a contract to borrow or to lend money; or of an agreement to pay a certain fund to one creditor in preference to others or of an agreement by creditors to receive a portion of their debts in satisfaction of the whole;¹

¹¹ *Adams v. Messenger*, *supra*; *Pusey v. Pusey*, 1 Vern. 273; *Fells v. Read*, 3 Vesey Jr. 70; *Williams v. Howard*, 3 Murph. 74; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *McGowan v. Remington*, 12 Pa. St. 56, 51 Am. Dec. 584; *Gillett v. Warren*, 10 N. M. 523; 62 Pac. 975; *Beasley v. Alleyn*, 15 Phila. 97; *Onondago Nation v. Thacher*, 61 N. Y. S. 1027, 65 Id. 1014.

¹² *Lining v. Geddes*, 1 McCord. Ch. 304, 16 Am. Dec. 607.

¹³ *Pomeroy's Eq. Jur.*, § 1402, note.

¹ *Lawson Rights, Rem. & Pr.*, § 2588.

or of a debt for work and labor; or for money payable under a building contract; or of a contract for personal services.² As put by one judge: "There is no case of a specific performance decreed of an agreement to build a house, because if A will not do it, B may. Specific performance is only decreed where the party wants the thing in specie and cannot have it in any other way."³

§ 495. *Vendor as Well as Vendee Entitled.*

The vendor as well as the vendee may obtain specific performance of a contract for the sale of land.¹

The reasons on which the relief is founded are:

First. The remedy in the action for damages is *not* adequate. While on the sale of chattels, by the very act of delivery, the property becomes vested in the purchaser and the seller may recover the whole contract price—this does not apply to real estate which can only be transferred by deed.² Therefore in actions at law against a vendee on a contract for the purchase of real estate who refuses to complete it, the measure of damages is not the amount of the purchase money but is the difference between the contract price and the market value of the land at the time of the breach.³

² See *ante*, § 490.

³ *Keynon, M. R., in Errington v. Aynesley*, 2 Brown Ch. 343; *Woodruff v. Germansky* (N. Y.), 135 N. E. 601. Some of the cases fall also under another rule, viz., that the court will not undertake to direct a continuous service; see *ante*, § 489.

¹ *Old Colony R. Co. v. Evans*, 6 Gray. 25, 66 Am. Dec. 394; *Brown v. Huff*, 5 Paige, Ch. 235, 28 Am. Dec. 425; *Hanna v. Wilson*, 3 Gratt. 243, 46 Am. Dec. 190; *Pugh v. Chesseldure*, 11 Ohio, 109, 37 Am. Dec. 414; *Robinson v. Harbour*, 42 Miss. 795, 97 Am. Dec. 501.

² Of course if the deed has been executed and delivered the whole consideration may be recovered in an action at law.

³ *Hurd v. Dunsmore*, 63 N. H. 171; *Griswold v. Sabin*, 51 N. H. 167; 12 Am. Rep. 76; *Old Colony R. R. Co. v. Evans*, 6 Gray, 25, 66 Am. Dec. 394; *Garrard v. Dollar*, 4 Jones, 175, 67 Am. Dec. 271. To this is to be added, of course, the cost incurred by the vendor in completing the sale. *Laird v. Pim*, 7 M. & W. 474; *Hurd v. Dunsmore*, 63 N. H. 171.

Second. The remedy of specific performance ought to be mutual and reciprocal which it would not be if the vendee could obtain it, and at the same time be denied to the vendor.⁴

The decree in such cases is not for the money agreed to be paid with an award of execution if it is not, but it should direct a sale of the premises in case of default, and should require the plaintiff to deposit with the court a proper conveyance of the land.⁵

§ 496. *Performance Compelled by Means of Injunction.*

Whatever promise or covenant a court of equity will compel a man to perform, by a decree for specific performance, it will generally restrain him from neglecting to perform, by injunction.¹ A promise or covenant, it is obvious, may be either that one will do a certain thing or that one will not do it; in the one case an (a) *affirmative*, in the other a (b) *negative*, promise or covenant.

(a) The remedy in equity in the first case is usually by a bill for specific performance, as we have seen. Yet the court will in some cases enforce indirectly the affirmative terms of a contract of which it could not directly decree the specific performance, and this by means of a mandatory injunction.² Thus an agreement to remove certain buildings has been enforced by an injunction against the continuance of the build-

⁴ Andrews v. Sullivan, 2 Gilm. 327, 43 Am. Dec. 53, 2 Story Eq. Jur. § 723.

⁵ Andrews v. Sullivan, 2 Gilm. 327, 43 Am. Dec. 53; Heatherwick v. Heatherwick, 32 Ill. 73; Wade v. Greenwood, 2 Rob. 474, 40 Am. Dec. 759.

¹ Snell, Eq. 488; Diamond Match Co. v. Rolber, 106 N. Y. 473; Club v. Levee Dist. (Tex.), 235 S. W. 607.

² Leake Contr. 1120; Lane v. Newdegate, 10 Ves. 192; Isenberg v. East India House Co., 3 De G. J. & S. 272; Springfield R. Co. v. Springfield, 85 Mo. 674.

ings,³ and lessors who had covenanted to manage land or cultivate a farm in a husbandlike manner, have been restrained from doing acts of bad husbandry, although there was no express covenant to refrain from such acts.⁴

An insolvent has been enjoined from selling goods to others that he had agreed to sell to the plaintiff, where the failure to obtain them would have caused him to break contracts with others made on the faith of the first contract and subject him to a multiplicity of suits.⁵

Because damages would not be adequate, an injunction was granted to prevent the publisher of a newspaper who had contracted to furnish advertising space at a certain rate for a specified time from refusing to continue the advertisement unless the advertiser would pay in advance an increased price before the completion of the contract.⁶

(b) Where a person agrees not to do a certain act, specific performance is decreed in the form of an injunction restraining the party from doing the act.⁷ Thus injunctions have been issued to restrain a person who has parted with the good will of a business from violating a promise not to engage in it for a certain term or in certain territory;⁸ or an employee from violating a promise not to accept employment from others during his contract or for a certain time thereafter;⁹ to restrain a person who had entered into a covenant not to ring church bells from so doing;¹⁰ to restrain

³ Ranken v. Huskinson, 4 Sim. 13; Lord Manners v. Johnson, L. R. 1 Ch. Div. 673.

⁴ Drury v. Molins, 6 Ves. 328; Pratt v. Brett, 2 Madd. 62; Briggs v. Law, 4 Johns. Ch. 23; Kerr on Injunctions, 522.

⁵ Friedberg v. McClary, 173 Ky. 579, 191 S. W. 300; Scholtz v. Surety Co. (Ida.), 206 P. 187.

⁶ Schuster v. Kuryer Pub. Co., 165 Wis. 327, 162 N. W. 172.

⁷ Banett v. Blagrove, 5 Vesey, 555, 6 Ves. 104; Hapgood v. Rosenstock, 23 Fed. Rep. 86; Steward v. Winters, 4 Sandf. Ch. 567.

⁸ Doty v. Martin, 32 Mich. 462; Butler v. Bruleson, 16 Vt. 176; Guerand v. Dandelet, 32 Md. 561, 3 Am. Rep. 164.

⁹ Samuel Stores v. Abrams, 108 Atl. 541 (Conn.), and note in 9 A. L. R. 1456.

¹⁰ Martin v. Nutkin, 2 P. Wms. 266.

an author who on the sale of a work had covenanted with the purchaser not to do anything which might be detrimental to the sale or publication of that work, from publishing a rival work on the same subject;¹¹ to restrain tenants from violating covenants in their leases as to the mode of cultivation, or the use of the premises;¹² to restrain the erection of buildings beyond a certain height;¹³ to restrain the erection or compel the removal of bay windows;¹⁴ to restrain the use of building lots except for the erection of dwellings;¹⁵ to restrain the carrying on of particular trades in demised premises;¹⁶ and in many other cases of a similar character.¹⁷

And it is now well settled¹⁸ that the inability of a court of equity to compel the specific performance of one part of an agreement is no ground for its refusing to enjoin the breach of another part of the same agreement.¹⁹ In *Lumley v. Wag-*

¹¹ *Barfield v. Nicholson*, 2 Sim. & Stu. 1.

¹² *Flemming v. Snook*, 5 Beav. 250; *Maddox v. White*, 4 Md. 72; 59 Am. Dec. 67; *Sutton v. Head*; 86 Ky., 156, 29 Am. St. Rep. 156; *Hodge v. Sloan*, 107 N. Y. 244.

¹³ *Lloyd v. London, etc.*, R. Co., 2 De G. J. & Sm. 568.

¹⁴ *Lord Manners v. Johnson*, L. R. 1 C. D. 673; *Western v. Macdermot*, L. R. 1 Eq. 499; *Lumber Co. v. Mill* (Cal.), 201 P. 129.

¹⁵ *St. Andrew's Church Appeal*, 67 Pa. St. 512.

¹⁶ *Kemp v. Sober*, 1 Sim. N. S. 517; *Hodson v. Coppard*, 29 Beav. 4; *Clements v. Wells*, L. R. 1 Eq. 200; *Parker v. White*, 1 Hem. & M. 167.

¹⁷ *Kerr on Injunctions*, Injunction will lie against a breach of an agreement not to engage in business, although the contract provides for liquidated damages. *Bradshaw v. Millikin*, 92 S. E. 161 (N. C.).

¹⁸ In the earlier cases equity would not restrain the violation of the negative part of an agreement when it could not enforce the affirmative stipulations, but the party was left to his remedy at law. *Kemble v. Kean*, 6 Sim. R. 333.

¹⁹ *Hays v. Willis*, 11 Abb. Pr. (N. S.) 167; *Daly v. Smith*, 49 How. Pr. 150, 38 N. Y. (S. C.) 158; *Richardson v. Peacock*, 26 N. J. (Eq.) 40; *Gillis v. Hall*, 2 Brewst. 342; *Chicago, etc., R. Co. v. New York, etc., Co.*, 24 Fed. R 521; *Port Clinton R. Co. v. Cleveland, etc., R. Co.*, 13 Ohio St. 550; *Marble Co. v. Ripley*, 10 Wall, 358; *McCaul v. Braham*, 16 Fed., 37 note 42-47; *Pub. Co. v. Comm.* (U. S.), 270 Fed. 881.

ner,²⁰ defendant agreed with plaintiff to sing at his theater upon certain terms, and during a certain period to sing nowhere else. Subsequently she entered into an agreement with another person to sing at another theater, and refused to perform her contract with plaintiff. The court, while admitting that it was powerless to enforce so much of the contract as related to the promise to sing at plaintiff's theater, restrained defendant from performing at any other theater.

²⁰ 1 De G. M. & G. 604. The court will not enforce the performance of ordinary contracts of service in this way; it is only where the service is to be rendered by one having special and extraordinary qualifications, as "for example, by an eminent actor, singer, artist and the like * * * Damages for a breach of such contracts are not only difficult to ascertain, but cannot with any certainty be estimated; nor could the plaintiff procure by means of damages the same services in the labor market, as in case of an ordinary contract of employment between an artizan, a laborer or a clerk and their employer." *Cort v. Lassard*, 18 Oreg. 221, 17 Am. St. Rep. 726.

CHAPTER XX.

DISCHARGE OF RIGHT OF ACTION.

Section 497. Introductory.

(A) RELEASE.

- 498. Release Defined and Explained.
- 499. Covenant Not to Sue.

(B) ACCORD AND SATISFACTION.

- 500. Accord and Satisfaction Defined and Explained.

(C) JUDGMENT.

- 501. Effect of Judgment.

(D) LAPSE OF TIME.

- 502. Introductory.

1. *Independent of Statute.*

- 503. Presumption of Payment.
- 504. Laches in Equity.

2. *Under Statute of Limitations.*

- 505. Statutes of Limitations Bar Action.
- 506. When Statute Begins to Run.
- 507. Statutory Bar May Be Removed.

§ 497. *Introductory.*

Upon every breach of contract, whether it discharges or not the agreement of the other party,¹ there arises in favor of the injured party a right of action for compensation. This right of action cannot be discharged by any payment or performance, or tender of payment or performance by the promisor, without the consent and acceptance of the promisee; for

¹ See ante, § 464.

the promisee, after breach, becomes entitled to the compensation or remedy provided by process of law, and is not bound to accept any tender or offer made in satisfaction of his legal rights.²

The question to be considered in this chapter is, how may this Right of Action be discharged; and it is answered that the right of action arising from a breach of a contract may be discharged in four ways: (a) by release, (b) by accord and satisfaction, (c) by judgment, (d) by lapse of time.

(a)

RELEASE.

§ 498. *Release Defined and Explained.*

Release is a discharge of the claim or right of action growing out of the breach of an agreement.¹ It must, unless it be made for some new consideration, be under seal,² otherwise it will be nothing more than a promise without consideration to forbear from the exercise of a right, which we have seen is not binding.³ The release of a debt discharges all securities held by the creditor,⁴ but does not extinguish or defeat any future right or claim,⁵ and a general release is qualified and

² Lawson Rights, Rem. & Pr. § 2567.

¹ Leake Contr 1261.

² Ill. Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; Weber v. Couch, 134 Mass. 26, 45 Am. Rep. 274; Smithwick v. Ward, 7 Jones, 64, 75 Am. Dec. 453; Lancaster v. Lancaster, 42 Mo. (App.) 503; Kidder v. Kidder, 33 Pa. St. 268; Vet Co. v. Kessler (Mo.), 239 S. W. 159.

³ Ante, Chap. IV.

⁴ Cowper v. Green, 7 Mees. & W. 633, Jackson v. Stackhouse, 1 Cow. 122, 13 Am. Dec. 514.

⁵ Francis v. Boston Corporation, 4 Pick. 365, 368; Hastings v. Dickinson, 7 Mass. 153, 5 Am. Dec. 34; Gibson v. Gibson, 15 Mass. 106, 8 Am. Dec. 94.

controlled by a recital of the particular class of debts to which alone it is intended to apply.⁶

A voluntary delivery by the creditor to the debtor of the evidence of the debt, as a bill, note or bond, or the destroying of the instrument, with the intention of discharging the debt, operates as a release.⁷

A release of one of several debtors jointly, or jointly and severally, liable for the same debt, releases all.⁸

The reason for this is that if it did not have this effect the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released.⁹ But a release of one co-debtor may reserve a right against the other debtors, in which case they are not discharged.¹⁰ So the release by one of several co-creditors jointly entitled to the debt discharges the debtor as to all.¹¹

§ 499. *Covenant Not to Sue.*

A covenant made by a creditor with his debtor not to sue him at any time for the debt, although it does not in terms release the debtor, and purports only to bind the creditor by covenant, is upon the principle of avoiding circuity of action, equivalent to a release, and may be so pleaded in an action by the creditor for the debt, the subject of the covenant.¹ But a

⁶ Lawson Rights, Rem. & Pr. § 2576.

⁷ Gardner v. Gardner, 22 Wend. 526, 34 Am. Dec. 340; Beach v. Enders, 51 Barb. 570.

⁸ Baldwin v. Gray, 4 Martin (N. S.), 192, 16 Am. Dec. 169; Berry v. Gillis, 17 N. H. 9, 43 Am. Dec. 585; Hale v. Spaulding, 145 Mass. 482, 1 Am. St. Rep. 475; Benjamin v. McConnell, 4 Gilm. 536; 46 Am. Dec. 474.

⁹ North v. Wakefield, 13 Q. B. 451.

¹⁰ Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283.

¹¹ Leake Contr. 932; Beltzhoover v. Stockton, 4 Cranch C. C. 695; Myrick v. Dame, 9 Cush. 248.

¹ Russell v. Adderton, 64 N. C. 417; Cuyler v. Cuyler, 2 Johns. 186. But it is different where the covenant is not to sue for a limited time only. Ayloff v. Scrimshire, 2 Salk. 523; Clopper v. Union Bank, 2 Har. & J. 92, 16 Am. Dec. 294; Ford v. Beech, 11 Q. B. 852.

covenant not to sue one of several co-debtors jointly, or jointly and severally, liable, although it operates by construction as a release as between the covenantor and covenantee, does not operate as a release of the other debtors.²

(b)

ACCORD AND SATISFACTION.

§ 500. *Accord and Satisfaction Defined and Explained.*

An accord and satisfaction is an agreement by the creditor to accept something in satisfaction of his claim, accompanied by the delivery or performance of what is so agreed upon.¹ There must be both accord *and* satisfaction. By the accord the parties agree upon a sum of money, or other matter, to be given and accepted as compensation for the breach, instead of the legal remedy provided by process of law. But this is insufficient to bar an action.² It is by the execution of the accord, that is, by the actual delivery and acceptance of the matter agreed upon as a satisfaction, that the right of action is discharged.³ It is not a discharge of the contract which has been discussed in the last chapter, for the contract has been already discharged by its breach. Nor is it a contract;

² Goodnow v. Smith, 18 Pick. 414, 29 Am. Dec. 600; Brown v. White, 29 N. J. (L.) 514, 80 Am. Dec. 226; Lisle v. Anderson, 159 Pac. 278 (Okla.); Renner v. Laundry Co. (Iowa), 184 N. W. 611.

¹ Pulliam v. Taylor, 50 Miss. 251; Stockton v. Frey, 4 Gill. 406, 45 Am. Dec. 138; Heirn v. Carron, 11 Sm. & M. 361, 49 Am. Dec. 65.

² Ballard v. Nokes, 2 Ark. 45; Kromer v. Heim, 75 N. Y. 577, 31 Am. Rep. 491; Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537; Ellis v. Bitzer, 2 Ohio 89, 15 Am. Dec. 534; Hallendeber v. Piano Co. (Cal.), 201 P. 942.

³ Diller v. Brubaker, 52 Pa. St. 498, 91 Am. Dec. 177; Vedder v. Vedder, 1 Denio. 257; Brooklyn Bank v. De Grauw, 23 Wend. 342, 35 Am. Dec. 569; Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537; Hancock v. Yaden, 121 Ind. 366, 16 A. S. R. 396; Savage v. Edgar, 86 N. J. Eq. 205, 98 Atl. 407. But see Whitsett v. Clayton, 5 Colo. 476, where this well-established doctrine is criticised.

execution of it being necessary, it is simply an unenforceable agreement.⁴ As said in an old case, "*accord executed* is satisfaction; *accord executory* is only substituting one cause of action for another, which might go on to any extent." Therefore, readiness to perform the accord,⁵ or a tender of performance,⁶ or even part performance,⁷ is not enough.

The satisfaction may consist in the acquisition of a new right against the debtor, as, for example, the receipt from him of a negotiable instrument as payment,⁸ or of new rights against the debtor and third parties, as in the case of a composition with creditors;¹⁰ or of something different in kind to that which the debtor was bound by the original contract to perform;¹¹ but it must in all cases have been taken by the creditor as a full, perfect and complete *satisfaction* for his claim.¹²

⁴ Ashley, Contr. § 104.

⁵ Lyon v. Bruce, 2 H. Bl. 319.

⁶ Hearn v. Kiehle, 38 Pa. St. 147, 80 Am. Dec. 472; Russell v. Lytle, 6 Wend. 390, 22 Am. Dec. 537.

⁷ Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472; Brooklyn Bank v. De Grauw, 23 Wend. 342, 35 Am. Dec. 569; Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491.

⁸ Hearn v. Kiehl, 38 Pa. St. 147, 80 Am. Dec. 472. Unless the jury find that what the plaintiff accepted in satisfaction was not the *performance* but the *promise*. Hall v. Flockton, 16 Q. B. 1039; Evans v. Poins, 1 Ex. 601.

⁹ Witherby v. Mann, 11 Johns. 518; Bennett v. Hill, 14 R. I. 322; Guild v. Butler, 127 Mass. 386; Stanley Thompson Co. v. South Colo. Co., 178 Pac. 577 (Colo.). Where a claim is unliquidated or disputed the retention and use of a check sent by the debtor to the creditor in settlement is an accord and satisfaction. Stanley Thompson Co. v. South. Colo. Co., 178 Pac. 577 (Colo.). Fuller v. Kemp, 138 N. Y. 231; Flynn v. Hurlock, 194 Pa. St. 462.

¹⁰ Good v. Cheesman, 2 B. & Ad. 328; Kromer v. Heim, 75 N. Y. 577, 31 Am. Rep. 471; Baxter v. Bell, 86 N. Y. 195.

¹¹ Whitney v. Cook, 53 Miss. 551; Bennett v. Hill, 14 R. I. 322; Williams v. Phelps, 16 Wis. 80; Odwell v. Martin, 190 N. Y. S. 202.

¹² Jones v. Fennimore, 1 G. Greene, 134; Boston Rubber Co. v. Peerless Wringer Co., 58 Vt. 571; Line v. Nelson, 38 N. J. L. 358; Alden v. Thurber, 149 Mass. 271. A debtor may attach a condition to the offer and if so the acceptance of the thing is an acceptance of the condition. Berdell v. Bissell, 6 Col. 162; McDaniels v. Bank, 2 Vt. 230, 70 Am. Dec. 406.

It need not be under seal or even in writing, for a parol record and satisfaction will discharge a right of action founded on a deed or even on a judgment,¹³ but like all other parol agreements it requires a consideration;¹⁴ though the consideration need not be adequate¹⁵ provided it is neither illegal¹⁶ nor a past one.¹⁷

(c)

JUDGMENT.

§ 501. *Effect of Judgment.*

The final¹ judgment of a court of competent jurisdiction² in the plaintiff's favor discharges the right of action arising from breach of contract. The right is thereby *merged*³ in that more solemn form of obligation sometimes called a Contract of Record.⁴ It may then be discharged by payment of the judgment⁵ or by satisfaction obtained by process of execution.⁶ On the other hand, a judgment in the defendant's favor discharges the obligation by Estoppel.⁷ The

¹³ *Cabe v. Jameson*, 10 Ired. 193, 51 Am. Dec. 386; *Savage v. Everman*, 70 Pa. St. 315, 10 Am. Rep. 676.

¹⁴ See Ante, Chap. IV. Consideration.

¹⁵ *Warren v. Skinner*, 20 Conn. 589; *Donahoe v. Woodbury*, 6 Cush. 48; *Ogborn v. Hoffman*, 52 Ind. 439; *Fisher v. May*, 2 Bibb, 449, 5 Am. Dec. 626; *Reid v. Bartlett*, 19 Pick. 273.

¹⁶ *Keeler v. Neal*, 2 Watts. 424; *Davis v. Noaks*, 3 J. J. Marsh, 494.

¹⁷ See Chap. IV.; *Stead v. Poyer*, 1 C. B. 782.

¹ *Webb v. Bucklew*, 82 N. Y. 555; *Linington v. Strong*, 111 Ill. 152.

² *Hickey v. Stewart*, 3 How. 750. So also the award of an arbitrator. *Smith v. R. Co.*, 36 N. H. 458; *Mach. Corp. v. Mach. Co. U. S.*, 276 Fed. 436.

³ See ante, § 424.

⁴ See ante, Chap. II.

⁵ *Thompkins v. Bank*, 53 Ill. 57; *Booth v. Bank*, 74 N. Y. 228.

⁶ *Chandler v. Higgins*, 109 Ill. 602.

⁷ *Cromwell v. Sac. Co.*, 94 U. S. 351; *Russell v. Place*, 94 U. S. 606; *Campbell v. Rankin*, 99 U. S. 261.

plaintiff cannot bring another action for the same cause so long as the judgment stands. But an adverse judgment, in order to estop the plaintiff from reasserting his claim, must have proceeded upon the merits of the case. If a man fail because he has sued in a wrong character, as executor instead of administrator; or at a wrong time;⁸ or if plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is supplied in the second suit,⁹ the judgment in the first suit is not a bar to a second suit on the same cause of action.¹⁰

The judgment may be set aside by the court in which it is rendered or by a higher court, in which case it may be entered in favor of the other party or the parties may be remitted to their original position.¹¹

(d)

LAPSE OF TIME.

§ 502. *Introductory.*

The rule established by the courts, and expressly enacted in the Statute of Limitations that lapse of time shall constitute a bar to the enforcement of a cause of action, is a rule of convenience and policy the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity and then ask for an inquiry. Justice

⁸ Brackett v. People, 115 Ill. 29; Kane v. Fisher, 2 Watts. 246.

⁹ Gould v. R. R. Co., 91 U. S. 526; Stowell v. Chamberlain, 60 N. Y. 272.

¹⁰ Knapp v. Eldridge, 33 Kan. 106; Brackett v. People, 115 Ill. 29; Wood v. Faut, 55 Mich. 185; Britton v. Thornton, 112 U. S. 526; Maxwell v. Clark, 139 Mass. 112.

¹¹ Clark v. Bowen, 22 How. 270; Chickering v. Falles, 29 Ill. 294; Wadhams v. Gay, 73 Ill. 415.

cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age and often regardless of them.¹ It is better for the peace and repose of society and the ends of justice that the presumption arising from the lapse of time should be adhered to and not be easily rebutted, although in many cases it may be contrary to the actual truth.²

Hence, a person who delays for an unnecessary length of time to avail himself of his legal right to enforce his action, may be met and defeated by: 1. A presumption or rule of law established by the courts independent of any statute; or, 2, the express provisions of the Statutes of Limitations.³

1.

INDEPENDENT OF STATUTE.

§ 503. *Presumption of Payment.*

Independently of the statute of limitations, as for example when the statute does not run because of the absence of the debtor from the state,¹ or there is no such statute, the law after a lapse of twenty years raises the presumption that debts generally, bonds, contracts, covenants or other obligations, have been paid or discharged.² When an action is brought on a bond or covenant for the payment of money if twenty years elapse between the time of its becoming due and of the institution of the action or proceeding, the defendant may, without pleading the statute of limitations, rely upon

¹ *Foulk v. Brown*, 2 Watts. 216.

² *DeFord v. Green*, 1 Marv. 316, 40 Atl. 1120 (Del.).

³ *Litchfield v. McDonald*, 35 Minn. 167.

¹ *Bean v. Tornelle*, 94 N. Y. 381, 46 Am. Rep. 153.

² *Lawson Presumptive Ev.*, rule 71, p. 308.

the presumption of payment.³ And though this presumption as to sealed instruments at least does not arise from lapse of time alone short of twenty years, yet a shorter time in connection with other circumstances may raise a presumption of fact that payment has been made.⁴ And no presumption of payment or discharge can be raised by lapse of time alone for a period less than that allowed by the statute of limitations in which to bring suit.⁵

§ 504. *Laches in Equity.*

Courts of equity have little sympathy with what they call stale claims,¹ and considering it mischievous to encourage claims founded on transactions that had taken place long before their aid is invoked, refuse to give relief after an unreasonable length of time, the result of the delay or *laches* of the plaintiff. It regards a delay in taking steps to set aside a fraudulent contract as having the effect of affirming it;² though if it appear that the fraud has not during such time been known by the complainant, no length of time—even though beyond the statutory time—is allowed to be taken advantage of by those who have benefited by it.³ So in the exercise of the peculiar jurisdiction of equity to order the specific performance of a contract,⁴ it is well settled that the

³ Colwell v. Prindle, 19 W. Va. 640.

⁴ Brubaker v. Taylor, 76 Pa. St. 83; Daby v. Erickson, 45 N. Y. 786; Garnier v. Renner, 51 Ind. 374.

⁵ Grafton Bk. v. Doe, 19 Vt. 467, 47 Am. Dec. 697; Ingraham v. Baldwin, 9 N. Y. 45. But in connection with other circumstances a jury may presume payment from a less time. Milledge v. Gardner, 83 Ga. 397; Henderson v. Lewis, 9 S. & R. 379, 11 Am. Dec. 733.

¹ See Bisp. Eq., § 203; Perry v. Craig, 3 Mo. 525; Allore v. Jewell, 4 Otto, 512; Menchew v. Morris (Tex.), 241 S. W. 215.

² Lawson Rights, Rem. & Pr., § 2362.

³ Bisp. Eq. § 203; Brown v. Norman, 65 Miss. 369, 7 Am. St. Rep. 663.

⁴ See ante, § 489.

plaintiff may lose his right to ask specific performance by unnecessary delay on his part,⁵ the rule being, that if a party seeking a specific execution of a contract has been guilty of gross laches, or if in the intermediate period there has arisen a material change of circumstances, affecting the rights, interests and obligations of the parties, a court of equity will refuse to decree a specific performance.⁶

But the presumption of payment may be rebutted by any competent evidence tending to show that the debt was not in fact paid;⁷ for this presumption is different in its nature from the bar interposed by the Statute of Limitations.

The latter is a prohibition of the action; the former *prima facie* obliterates the debt. The bar is removed by nothing less than a new promise to pay or an acknowledgment consistent with a new promise. The presumption is rebutted or, to speak accurately, does not arise where there is affirmative proof, beyond that furnished by the writing itself, that the debt has not been paid or where there are circumstances that sufficiently account for the delay of the creditor.⁸

2.

UNDER STATUTE OF LIMITATIONS.

§ 505. *Statute of Limitations Bars Action.*

Theoretically a person who has a claim against another would seem to have a right to be allowed to prosecute it at any time. Nevertheless, in all the States statutes are in force

⁵ *Bennett v. Welch*, 25 Ind. 140, 87 Am. Dec. 354; *O'Fallon v. Kennerly*, 45 Mo. 124; *Bullock v. Adams*, 20 N. J. Eq. 367; *De Cordova v. Smith*, 9 Tex. 129, 58 Am. Dec. 136; *Williams v. Hart*, 116 Mass. 513; *Preston v. Preston*, 95 U. S. 200; *Tilden v. Barber* (U. S.), 268 Fed. 587.

⁶ *Holgate v. Eaton*, 116 U. S. 33; *Madox v. McQuean*, 3 A. K. Marsh. 400; *Hedenberg v. Jones*, 73 Ill. 149.

⁷ *Talbot v. Hathaway*, 113 Me. 324, 93 Atl. 834; *Sheafer v. Woodside*, 257 Pa. 101, Atl. 753, and note in 1 A. L. R. 779.

⁸ *Reed v. Reed*, 46 Pa. St. 239.

called Statutes of Limitations, which take away the remedy for a breach of contract or any other injury after the lapse of a certain time. And these statutes rest not on the actual probability that a debt which has not been claimed for a long time has been paid, and that this was the reason of the silence of the creditor, but as in the common law presumption of payment on the inexpediency and injustice of permitting a stale and neglected claim or debt, even if it has not been paid, to be set up and enforced after a long silence and acquiescence.¹ Their provisions as to the length of time given for different kinds of actions differ in the different States and cannot be set out here.

§ 506. *When Statute Begins to Run.*

In the ordinary course, the statutes begin to run or to take effect as soon as the cause of action arises, *i. e.*, from the time when the injured party becomes first entitled to bring his suit,¹ but the statutes generally provide that infancy, coverture, insanity, imprisonment, or absence beyond seas shall, where plaintiff is affected by any of these disabilities at the time the cause of action arose, suspend the operation of the statute until the removal of the disability. But a disability arising after the period of limitation has begun to run will not affect the operation of the statute unless the statute so declares.²

The statute will not be prevented from running because of

¹ *Jewett v. Petit*, 4 Mich. 509; *Parker v. Butterworth*, 46 N. J. (L.) 247, 50 Am. Rep. 407; *Fix v. Cook* (Ky.), 234 S. W. 453.

¹ *McMichael v. Carlyle*, 53 Wis. 504; *Jones v. Jones*, 91 Ind. 378; *Zuck v. Culp*, 59 Cal. 142.

² *Jackson v. Jackson*, 5 Cow. 74, 15 Am. Dec. 433; *Hogan v. Kurtz*, 94 U. S. 773; *Swearingen v. Robertson*, 39 Wis. 462; *Kistler v. Heath*, 75 Ind. 177, 39 Am. Rep. 131; *Land Co. v. Cypress Co.* (U. S.), 42 S. Ct. 284.

the ignorance of the plaintiff that a right of action existed." But in equity where that ignorance is produced by the fraud of defendant, and no reasonable diligence would have enabled plaintiff to discover that he had a cause of action, the statutory period commences with the *discovery of the fraud*.¹ And the equitable rule has been adopted in some of the States by the express terms of the statutes, which run only from the time that a fraudulent concealed right becomes known to the person suing.⁵

§ 507. *Statutory Bar May Be Removed.*

The statutes of limitation do not extinguish the right but merely bar the remedy, and they therefore provide that the claim may be revived after it has become barred by the lapse of the statutory period by (a) a new promise to pay the debt; by (b) a subsequent acknowledgment of the debt; or by (c) a part payment of the debt.

(a) A debtor may by a new promise to pay the debt remove the bar of the statute, and become liable to be sued upon it. Such a promise, as we have seen, is valid though made upon a past consideration.¹

(b) The early cases held that a simple allusion to the debt as existing, though accompanied by a declaration of an intent not to pay, was a sufficient "acknowledgment" to remove the bar of the statute. But it is now universally held that the "acknowledgment" to be effective must be in such terms as

³ Crawford v. Gaulden, 33 Ga. 173; Hartford Bank v. Watermann, 26 Conn. 324; Williams v. Pomeroy Coal Co., 37 Ohio St. 583; Peak v. Buck, 3 Baxt. 71.

⁴ Haymore v. Yaddin Comms., 85 N. C. 268; Atlantic Bank v. Harris, 118 Mass. 147; Conner v. Goodman, 104 Ill. 365; Wilcox v. Jackson, 57 Iowa, 278.

⁵ See cases in last note. Hickam v. Hickam, 46 Mo. (App.) 496.

¹ See ante, Chap. IV.

warrant the inference of a promise to pay the debt.² And both the promise and the acknowledgment to remove the bar must be made to the proper person, by the proper person, and with proper formalities when they are required by statute,—which are in most of the States that they shall be in writing.³ The acknowledgment may be made to a third person if it was intended to be communicated to the creditor.⁴ If the promise is conditional, performance of the condition must be proved.⁵

(c) A part payment, on account of the principal, or a payment of interest upon the debt, will take the contract out of the statute. But the payment must be made with reference to the original debt, and in such manner as to amount to an acknowledgment of it.⁶

• 860 (1929) et seq.
in writing

Ten years, & no years, contract
 not in writing three years

put against the statute
 for omission of the word "but"

² Purdy v. Austin, 3 Wend. 187; Riggs v. Roberts, 85 N. C. 151, 39 Am. Rep. 692; Abercombie v. Butts, 72 Ga. 74, 53 Am. Rep. 832.

³ Kirby v. Mills, 78 N. C. 124, 24 Am. Rep. 460; Fuqua v. Dunwiddle, 6 Lee, 645; Power Co. v. Davidson (Ala.), 90 S. 915.

⁴ Miller v. Teeter, 31 Atl. Rep. 394 (N. J.); De Freest v. Warner, 98 N. Y. 217.

⁵ Meyerhoff v. Froelich, 4 C. P. D. 63.

⁶ Tippetts v. Heane, 1 C. M. & R. 252; Cucullu v. Hernandez, 103 U. S. 105.

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Legal Tender

Silver dollars are legal tender for all debts except where otherwise specified in contract.

2. Lesser silver coins are legal tender for all sums not exceeding ten dollars. 50¢ 25¢ 10¢

3. The minor coins are legal tender up to twenty five cents (5¢ - 1¢)

Monetary substitution by common consent

misrepresentation in ~~attitude~~ ^{attitude} be or falsehood
framed - a misunderstanding or falsehood -
Underway relatively ¹¹ - close relations (Lampen -
Klient)

